4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1081

[Docket No. CFPB–2022–0009]

RIN 3170-AB08

Rules of Practice for Adjudication Proceedings

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Procedural rule; request for public comment.

SUMMARY: The Consumer Financial Protection Bureau (Bureau) is issuing this procedural rule to update its Rules of Practice for Adjudication Proceedings (Rules of Practice). This rule expands the opportunities for parties in adjudication proceedings to conduct depositions. It also contains various amendments regarding timing and deadlines, the content of answers, the scheduling conference, bifurcation of proceedings, the process for deciding dispositive motions, and requirements for issue exhaustion, as well as other technical changes. Overall, the amendments will provide the parties with earlier access to relevant information and also foster greater procedural flexibility, which should ultimately contribute to more effective and efficient proceedings. The Bureau welcomes comments on this rule, and the Bureau may make further amendments if it receives comments warranting changes.

DATES: This procedural rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Comments must be received on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, identified by Docket No. CFPB-2022-0009 or RIN 3170-AB08, by any of the following methods:

- *Federal eRulemaking Portal*: *https://www.regulations.gov*. Follow the instructions for submitting comments.

- *Email*: *2022-Rules-of-Practice@cfpb.gov*. Include Docket No. CFPB-2022-0009 or RIN 3170-AB08 in the subject line of the message.
- *Mail/Hand Delivery/Courier*: Comment Intake—Rules of Practice for Adjudication Proceedings, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

Instructions: The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, and in light of difficulties associated with mail and hand deliveries during the COVID-19 pandemic, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov*. In addition, once the Bureau's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202-435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Kevin E. Friedl or Christopher Shelton, Senior Counsels, Legal Division, at 202-435-7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The Consumer Financial Protection Act of 2010 (CFPA) establishes the Bureau as an independent bureau in the Federal Reserve System and assigns the Bureau a range of rulemaking, enforcement, supervision, and other authorities.[1] The Bureau's enforcement powers under the CFPA include section 1053, which authorizes the Bureau to conduct adjudication proceedings.[2] The Bureau finalized the original version of the Rules of Practice, which govern adjudication proceedings, in 2012 (2012 Rule).[3] The Bureau later finalized certain amendments, which addressed the issuance of temporary cease-and-desist orders, in 2014 (2014 Rule).[4]

II. Legal Authority

Section 1053(e) of the CFPA provides that the Bureau "shall prescribe rules establishing such procedures as may be necessary to carry out" section 1053.[5] Additionally, section 1022(b)(1) provides, in relevant part, that the Bureau's Director "may prescribe rules . . . as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."[6] The Bureau issues this rule based on its authority under section 1053(e) and section 1022(b)(1).

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[1] Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, 1955-2113 (2010).

[2] 12 U.S.C. 5563; *see also* section 1052(b), 12 U.S.C. 5562(b) (addressing subpoenas).

[3] 77 FR 39057 (June 29, 2012); *see also* 76 FR 45337 (July 28, 2011) (interim final rule).

[4] 79 FR 34622 (June 18, 2014); *see also* 78 FR 59163 (Sept. 26, 2013) (interim final rule).

[5] 12 U.S.C. 5563(e). As courts have recognized, the term "necessary" is "a 'chameleon-like' word" whose meaning can vary based on context; in the context of section 1053(e), the Bureau interprets "'necessary' to mean 'useful,' 'convenient' or 'appropriate' rather than 'required' or 'indispensable.'" *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 391-94 (3d Cir. 2004). Section 1053 sets out the fundamental features of Bureau adjudications, but it leaves many details open that can only be addressed through more specific Bureau procedures. In turn, those Bureau procedures could not be effective, or fair to the parties, if they were limited to only the most rudimentary steps that would be indispensable to holding a skeletal proceeding. Instead, the Bureau believes that Congress gave the Bureau room to adopt procedures that are useful in carrying out section 1053.

[6] 12 U.S.C. 5512(b)(1).

III. Section-by-Section Analysis

Overview

The Bureau is republishing the entire Rules of Practice in the Code of Federal Regulations. The changes that the Bureau is making in this rule, compared to the previous version of the Rules of Practice, are summarized in the section-by-section analysis below. Also, the Bureau will include an unofficial, informal redline of the changes in the docket for this rule on *https://www.regulations.gov* in order to assist stakeholders' review.[7]

1081.114(a) Construction of Time Limits.

The Bureau is amending 12 CFR 1081.114(a) (Rule 114(a)) to simplify and clarify the provisions describing how deadlines are computed. It governs the computation of any time limit in this part, by order of the Director or the hearing officer, or by any applicable statute. These amendments are based on similar amendments made to Federal Rule of Civil Procedure 6(a) in 2009.

Under the previous Rule 114(a), a period of ten days or less was computed differently than a longer period. Intermediate Saturdays, Sundays, and Federal holidays were included in computing longer periods, but excluded in computing shorter periods. The previous Rule 114(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day—and the 10-day period not infrequently ended later than the 14-day period.

Under the amended Rule 114(a), all deadlines stated in days are computed in the same way. The day of the event that triggers the deadline is not counted. All other days—including intermediate Saturdays, Sundays, and Federal holidays—are counted, with one exception: If the period ends on a Saturday, Sunday, or Federal holiday as set forth in 5 U.S.C. 6103(a), then the deadline falls on the next day that is not a Saturday, Sunday, or Federal holiday.

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[7] In the event of a conflict between the redline and the version in the *Federal Register*, the latter controls.

Periods previously expressed as ten days or less will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. The Bureau is lengthening many of those periods to compensate for the change.[8]

The Bureau is also adjusting most of the 10-day periods in the Rules of Practice to account for the change in computation method, by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the previous computation method—two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period—the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods also led in many cases to adopting 7-day periods to replace many of the periods with periods using 7-day increments.

1081.115(b) Considerations in determining whether to extend time limits or grant postponements, adjournments and extensions.

Previously, 12 CFR 1081.115(b) (Rule 115(b)) stated that the Director or the hearing officer should adhere to a policy of strongly disfavoring granting motions for extensions of time, except in circumstances where the moving party makes a strong showing that the denial of the motion would substantially prejudice its case. It then listed factors that the Director or hearing officer will consider. The Bureau is simplifying this provision to state only that such motions are generally disfavored, while retaining the same list of factors that the Director or hearing officer will consider. The Bureau continues to believe that extensions of time should generally be disfavored, but it believes that relatively more flexibility than the previous language provided may be appropriate.

[8] *See*, *e.g.*, amended 12 CFR 1081.105(c)(2), 1081.200(c), 1081.202(a).

1081.201(b) Content of answer.

The previous 12 CFR 1081.201(b) (Rule 201(b)) required a respondent to file an answer containing, among other things, any affirmative defense. The Bureau is amending Rule 201(b) to make clear that this includes any avoidance, including those that may not be considered "affirmative defenses." As the Securities and Exchange Commission (SEC) explained when it adopted a similar amendment to its rules of practice, timely assertion of such theories should help focus the use of prehearing discovery, foster early identification of key issues and, as a result, make the discovery process more effective and efficient.[9]

1081.203 Scheduling conference.

The provision at 12 CFR 1081.203 (Rule 203) requires a scheduling conference with all parties and the hearing officer for the purpose of scheduling the course and conduct of the proceeding. Before that scheduling conference, Rule 203 requires the parties to meet to discuss the nature and basis of their claims and defenses, the possibilities for settlement, as well as the matters that will be discussed with the hearing officer at the scheduling conference. The Bureau is making certain changes to Rule 203, including renumbering of provisions. This discussion cites the provisions as renumbered.

First, the Bureau is amending Rule 203(b) to require that the parties exchange a scheduling conference disclosure after that initial meeting, but before the scheduling conference. That disclosure must include a factual summary of the case, a summary of all factual and legal issues in dispute, and a summary of all factual and legal bases supporting each defense. The disclosure must also include information about the evidence that the party may present at the hearing, other than solely for impeachment, including (i) the contact information for anticipated witnesses, as well as a summary of the witness's anticipated testimony; and (ii) the identification of documents or other exhibits.

[9] 81 FR 50211, 50219-20 (July 29, 2016).

The Bureau is also adopting certain amendments to Rules 203(c), (d), and (e). Amended Rule 203(c) provides that a party must supplement or correct the scheduling conference disclosure in a timely manner if the party acquires other information that it intends to rely upon at a hearing. Amended Rule 203(d) provides a harmless-error rule for failures to disclose in scheduling conference disclosures. Finally, the Bureau is adopting certain minor clarifications to Rule 203(e), which governs the scheduling conference itself.

These amendments to Rule 203 are intended to foster early identification of key issues and, as a result, make the adjudication process, including any discovery process, more effective and efficient. They are also intended to, early in the process, determine whether the parties intend to seek the issuance of subpoenas or file dispositive motions so that, with input from the parties, the hearing officer can set an appropriate hearing date, taking into account the time necessary to complete the discovery or decide the anticipated dispositive motions.

The Bureau recognizes that, in most cases, the deadline for making the scheduling conference disclosure will also be the date the Office of Enforcement must commence making documents available to the respondent under 12 CFR 1081.206 (Rule 206). As the Bureau explained in the preamble to the 2012 Rule, it is the Bureau's expectation that the Office of Enforcement will make the material available as soon as possible in every case.[10] And even in cases where the Office of Enforcement cannot make those documents available within that time, a respondent may request a later hearing date and can move the hearing officer to alter the dates for either the scheduling conference or the scheduling conference disclosure.

1081.204(c) Bifurcation.

The Bureau is adding a new 12 CFR 1081.204(c) (Rule 204(c)) to address bifurcation of proceedings. It provides that the Director may order that the proceeding be divided into two or more stages, if the Director determines that it would promote efficiency in the proceeding or for

[10] 77 FR 39057, 39072 (June 29, 2012).

other good cause. For example, the Director may order that the proceeding have two stages, so that at the conclusion of the first stage the Director issues a decision on whether there have been violations of law and at the conclusion of the second stage the Director issues a final decision and order, including with respect to any remedies. The Director may make an order under Rule 204(c) either on the motion of a party or on the Director's own motion after inviting submissions by the parties. The Director may include, in that order or in later orders, modifications to the procedures in the Rules of Practice in order to effectuate an efficient division into stages, or the Director may assign such authority to the hearing officer.[11]

Bifurcation is a standard case-management tool available to Federal district courts. The new Rule 204(c) will provide the Bureau with the flexibility to use bifurcation in adjudication proceedings, if warranted by particular cases, and to tailor its procedures to the circumstances of those bifurcated cases.

1081.206 Availability of documents for inspection and copying.

Rule 206 provides that the Bureau's Office of Enforcement will make certain documents available for inspection and copying. The Bureau is amending Rule 206 to clarify certain categories of documents that may be withheld or information that may be redacted, as well as to make clear that the Office of Enforcement may produce those documents in an electronic format rather than making the documents available for physical inspection and copying.

The clarifying amendments regarding documents that may be withheld or information that may be redacted are based on amendments the SEC recently made to its rules of practice. Amended Rule 206(b)(1)(iv) makes clear that the Office of Enforcement need not produce a document that reflects only settlement negotiations between the Office of Enforcement and a person or entity who is not a current respondent in the proceeding. As the SEC explained when it amended its rules of practice, this amendment is consistent with the important public policy

[11] The new provision also clarifies that only the decision and order of the Director after the final stage, and not a decision of the Director after an earlier stage, will be a final decision and order for purposes of specified provisions of the Rules of Practice and section 1053(b) of the CFPA.

interest in candid settlement negotiations, will help to preserve the confidentiality of settlement discussions, and help safeguard the privacy of potential respondents with whom the Office of Enforcement has negotiated.[12] Amended Rule 206 also permits the Office of Enforcement to redact from the documents it produces information it is not obligated to produce (Rule 206(b)(2)(i)) and sensitive personal information about persons other than the respondent (Rule 206(b)(2)(ii)). These amendments also track the SEC's recent amendments to its rules of practice and are designed to provide further protections for sensitive personal information and to permit the redaction of information that is not required to be produced in the first place.

The Bureau is also amending Rule 206(d) to change the date by which the Office of Enforcement must commence making documents available to the respondent, changing that date from seven days after service of the notice of charges to fourteen. This clarification harmonizes these timing provisions with 12 CFR 1081.119 (Rule 119), which protects the rights of third parties who have produced documents under a claim of confidentiality. The previous Rule 119 required a party to give a third party notice at least ten days prior to the disclosure of information obtained from that third party subject to a claim of confidentiality. Under the previous Rules of Practice, that meant that the Office of Enforcement had to provide notice to third parties *before* it commenced the adjudication proceeding because the Office of Enforcement had to give those third parties at least ten days' notice before producing the documents and the Office of Enforcement had to commence making documents available seven days after filing. Rule 119 is amended to require parties to notify the third parties at least seven days prior to the disclosure of information the third party produced under a claim of confidentiality. Together, Rules 119 and 206 now require the Office of Enforcement to commence making documents available fourteen days after service of the notice of charges and to notify third parties who produced documents

[12] 81 FR 50211, 50222 (July 29, 2016).

subject to that disclosure requirement under a claim of confidentiality at least seven days before producing those documents.

The previous Rule 206(e) provided that the Office of Enforcement must make the documents available for inspection and copying at the Bureau's office where they are ordinarily maintained. As the preamble to the 2012 Rule explained, the Bureau anticipated providing electronic copies of documents to respondents in most cases.[13] The Bureau is amending Rule 206(e) to recognize this practice and expressly provide that the Office of Enforcement may produce those documents in an electronic format rather than making the documents available for inspection and copying. Under the amended Rule 206(e), the Office of Enforcement retains the discretion to make documents available for inspection and copying.

1081.208 Subpoenas and 1081.209 Depositions.

The Bureau is making certain interrelated changes to 12 CFR 1081.208 and 1081.209 (Rules 208 and 209).

Rule 209 previously permitted parties to take depositions only if the witness was unable to attend or testify at a hearing. As the Bureau noted in the preamble to the 2012 Rule, the Bureau's Rules of Practice were modeled in part on the approach that the SEC took in its rules of practice.[14] Since that time, the SEC has amended its rules of practice to permit depositions.[15]

The Bureau is now amending Rule 209 to permit discovery depositions in addition to depositions of unavailable witnesses. The amendments to Rule 209 allow respondents and the Office of Enforcement to take depositions by oral examination pursuant to subpoena. The amended Rule 209 also permits parties to take a deposition by written questions upon motion and pursuant to a subpoena. If a proceeding involves a single respondent, the amendment allows the respondent and the Office of Enforcement to each depose up to three persons (i.e., up to three

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[13] 77 FR 39057, 39070 (June 29, 2012).

[14] 77 FR 39057, 39058 (June 29, 2012).

[15] 81 FR 50211 (July 29, 2016).

depositions per side). If a proceeding involves multiple respondents, the amendment allows respondents to collectively depose up to five persons and the Office of Enforcement to depose up to five persons (i.e., up to five depositions per side). This approach is consistent with the approach the SEC adopted when it amended its rules of practice to allow depositions.[16] A party may also move to take additional depositions, though that motion must be filed no later than 28 days prior to the hearing date. Amended Rule 209 also sets forth the procedure for requesting to taking additional depositions.

The above amendments to Rule 209 are intended to provide parties with further opportunities to develop arguments and defenses through deposition discovery, which may narrow the facts and issues to be explored during the hearing. Allowing depositions should facilitate the development of the case during the prehearing stage, which may result in more focused prehearing preparations, with issues distilled for the hearing and post-hearing briefing.

Under amendments to Rules 208 and 209, a party must request that the hearing officer issue a subpoena for the deposition. If the subpoena is issued, the party must also serve written notice of the deposition. The amendments to Rule 208, governing the issuance of subpoenas, correspond with the new provisions on depositions in Rule 209 by defining the standards for issuing a subpoena requiring the deposition of a witness. The amendment adds a new Rule 208(e) governing the standard for issuance of subpoenas seeking depositions upon oral examination. Under the amendment, the hearing officer will promptly issue any subpoena requiring the attendance and testimony of witnesses at a deposition only if the subpoena complies with Rule 209 and if the proposed deponent: (i) is a witness identified in the other party's scheduling conference disclosure now required under revised Rule 203(b); (ii) a fact witness;[17] (iii) is a designated expert witness under 12 CFR 1081.210(b) (Rule 210(b)); or (iv) a

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[16] *Id.* at 50216.

[17] Under amended Rule 209, this type of proposed deponent must have witnessed or participated in any event, transaction, occurrence, act, or omission that forms the basis for any claim asserted by the Office of Enforcement,

document custodian.[18] Fact witnesses, expert witnesses, and document custodians, whose knowledge of relevant facts does not arise from the Bureau's investigation, the Bureau's examination, or the proceeding, are the individuals most likely to have information relevant to the issues to be decided. Because the Bureau will also disclose to respondents the documents described in Rule 206 as well as witness statements upon request under 12 CFR 1081.207 (Rule 207), deposing Bureau staff whose only knowledge of relevant facts arose from the investigation, examination, or proceeding is unlikely to shed light on the events underlying the proceeding and will likely lead to impermissible inquiries into the mental processes and strategies of Bureau attorneys or staff under their direction. Not only does this implicate privileges or the work-product doctrine, but deposition of Bureau staff in this manner can be burdensome and disruptive because it embroils the parties in controversies over the scope of those protections.

The amendments to Rule 208 also provide a process for the hearing officer to request more information about the relevance or scope of the testimony sought and to refuse to issue the subpoena or issue it only upon conditions. This provision is intended to foster use of depositions where appropriate and encourage meaningful discovery, within the limits of the number of depositions provided per side. This provision should encourage parties to focus any requested depositions on those persons most likely to yield relevant information and thereby make efficient use of time during the prehearing stage.

Rule 208 previously permitted parties to request issuance of subpoenas requiring the attendance and testimony of witnesses at the designated time and place of the hearing, for the production of documentary or other tangible evidence, or for the deposition of a witness who will

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any defense, or anything else required to be included in an answer pursuant to Rule 201(b), by any respondent in the proceeding (this excludes a proposed deponent whose only knowledge of these matters arises from the Bureau's investigation, the Bureau's examination, or the proceeding).

[18] This excludes Bureau officers or personnel who have custody of documents or data that was produced from the Office of Enforcement to the respondent. In most circumstances, the Bureau officers or personnel were not the original custodian of the documents. Where the Bureau was the original custodian of the document—for example, a report of examination under 12 CFR 1081.303(d)(2) (Rule 303(d)(2))—there is no need to depose a document custodian as that report is admissible without a sponsoring witness.

be unavailable for the hearing. The Rules of Practice also permitted the deposition of expert witnesses under Rule 210. The amendments keep those provisions, making conforming amendments to account for the new provision permitting discovery depositions. A subpoena seeking the deposition of a witness who will be unavailable for the hearing does not count against the number of depositions permitted under Rule 209(a).

These new and amended provisions expand the available legitimate mechanisms respondents may use to conduct discovery, providing respondents a clearer understanding of the bases of the Bureau's factual contentions while reducing the costs and burdens of hearings on all parties. Additionally, the grounds for a hearing officer denying a request to issue a subpoena under Rule 208—that it is "unreasonable, oppressive, excessive in scope, or unduly burdensome"—are consistent with well-established judicial standards, and hearing officers will, in their consideration of requests for subpoenas, act diligently and in good faith to implement the standards for refusing or modifying deposition subpoenas set forth under the amended rule. These combined changes are overall less burdensome yet are equally effective in the resolution of the case on the merits.

Amended Rule 209 also adds procedures governing the taking of depositions, including depositions by written question. In general, once a subpoena for a deposition is issued, the party seeking the deposition must serve written notice of the deposition. That notice must include several things, including the time and place of the deposition, the identity of the deponent, and the method for recording the deposition. These and other procedural provisions track the SEC's recent amendments to its rules of practice.[19] They govern the process for seeking depositions by written questions and the taking of all depositions, including setting forth the deposition officer's duties, the process for stating objections, motions to terminate or limit the deposition, and the process for finalizing a transcript.

[19] 81 FR 50211, 50215-17 (July 29, 2016).

Finally, the Bureau is adding Rule 208(l), which addresses the relationship of subpoenas to the scheduling of the hearing. In the 2012 Rule, one reason why the Bureau did not—as a general matter—permit discovery depositions was because the additional time required for depositions before the hearing could be in tension with the statutory timetable for hearings under section 1053(b) of the CFPA.[20] As the preamble to the 2012 Rule noted, prehearing depositions would present extreme scheduling difficulties in those cases in which respondents did not request hearing dates outside the default timeframe under section 1053(b), which provides for the hearing to be held 30 to 60 days after service of the notice of charges, unless an earlier or a later date is set by the Bureau, at the request of any party so served.[21] The new Rule 208(l) addresses this scheduling obstacle to depositions and other discovery, by specifying that a respondent's request for issuance of a subpoena constitutes a request that the hearing not be held until after a reasonable period, determined by the hearing officer, for the completion of discovery.[22] This is because a request for discovery reasonably entails a delay for the discovery process to be completed.

Given this resolution of the 2012 Rule's scheduling concern, the Bureau believes that the benefits of discovery depositions under the amended Rule 209, as described earlier, outweigh other concerns expressed in the preamble to the 2012 Rule about the time, expense, and risk of collateral disputes arising from depositions.[23]

1081.211 Interlocutory review.

The provision at 12 CFR 1081.211 (Rule 211) governs interlocutory review. Rule 211(e) previously included language that stated that interlocutory review is disfavored, and that the

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[20] 12 U.S.C. 5563(b).

[21] 77 FR 39057, 39076 (June 29, 2012).

[22] Rule 208(l) goes on to specify that the hearing officer will decide whether to grant such a request. If the request is granted, the hearing officer will set a deadline for the completion of discovery and schedule the specific date of the hearing, in consultation with the parties. Rule 208(l) does not apply to a subpoena for the attendance and testimony of a witness at the hearing or a subpoena to depose a witness unavailable for the hearing.

[23] 77 FR 39057, 39076 (June 29, 2012).

Director will grant a petition to review a hearing officer's ruling or order prior to the Director's consideration of a recommended decision only in extraordinary circumstances. The Bureau is simplifying this language to state only that interlocutory review is generally disfavored. This is because, although interlocutory review remains disfavored, the Bureau believes that there can be situations where interlocutory review can contribute to the efficiency of proceedings short of extraordinary circumstances.

1081.212 Dispositive motions.

The Bureau is relocating the previous 12 CFR 1081.212(g) and (h) (Rule 212(g) and (h)), which addressed oral argument and decisions on dispositive motions, respectively, to form part of 12 CFR 1081.213 (Rule 213). Rule 213 is discussed in the next section of this section-by-section analysis.

Additionally, the Bureau is adopting a new Rule 212(g) to address the relationship of dispositive motions to the scheduling of the hearing, which is codified as Rule 212(g) but unrelated to the previous Rule 212(g). It is analogous to Rule 208(l), discussed above. It specifies that a respondent's filing of a dispositive motion constitutes a request that the hearing not be held until after the motion is resolved.[24] This is because the filing of a dispositive motion, whose purpose is to avoid or limit the need for a hearing, reasonably entails a delay of that hearing so that the motion can be resolved.

1081.213 Rulings on dispositive motions.

The Bureau is amending Rule 213 to adopt a new procedure for rulings on dispositive motions, based on a procedure used by the Federal Trade Commission (FTC). The Bureau is also making related technical changes for clarity.

Under the Bureau's existing Rules of Practice, the Director "may, at any time, direct that

[24] Rule 212(g) goes on to state that the hearing officer will decide whether to grant such a request. If the request is granted, the hearing officer will schedule the specific date of the hearing, in consultation with the parties.

any matter be submitted to him or her for review."[25] However, there was previously no specific procedure for the Director to exercise this discretion in the context of dispositive motions.

The new Rule 213(a) provides that the Director will either rule on a dispositive motion, refer the motion to the hearing officer, or rule on the motion in part and refer it in part. This is based on a similar process under the FTC's rules of practice.[26] The Bureau agrees with the reasoning of the FTC when it adopted this process a decade ago. The FTC explained that the head of the agency has authority and expertise to rule initially on dispositive motions, and doing so can improve the quality of decision-making and expedite the proceeding.[27] As the FTC further noted, an erroneous decision by an administrative law judge on a dispositive motion may lead to unnecessary briefing, hearing, and reversal, resulting in substantial costs and delay to the litigants.[28] Adopting this process will give the Director the flexibility to decide whether a given dispositive motion would be most efficiently addressed by the hearing officer, with ultimate review by the Director, or simply by the Director.

The new Rule 213(b) provides that, if the Director rules on the motion, the Director must do so within 42 days following the expiration of the time for filing all responses and replies, unless there is good cause to extend the deadline. If the Director refers the motion to the hearing officer, the Director may set a deadline for the hearing officer to rule. This is based on the parallel timing requirements under the FTC's rules of practice.[29] Previously, Rule 212(h) provided a 30-day timeframe for the hearing officer to decide dispositive motions, subject to extension.[30] But the Bureau believes that the FTC's somewhat more flexible approach to timing

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[25] 12 CFR 1081.211(a).

[26] 16 CFR 3.22(a). This FTC provision does not specifically discuss a situation where the agency head rules on the motion in part and refers it in part. The Bureau has included language in Rule 213(a) to specifically discuss this situation.

[27] 74 FR 1803, 1809-10 (Jan. 13, 2009).

[28] *Id.* at 1809-10.

[29] 16 CFR 3.22(a). This FTC provision includes an interval of 45 days, but as discussed elsewhere in this section-by-section analysis the Bureau is generally adopting time intervals in increments of seven days.

[30] *See* 12 CFR 1081.115 (change of time limits).

is warranted, given that the Director must first decide whether or not to refer the motion to the hearing officer and also has other responsibilities as the head of the agency. The Bureau believes that the overall efficiency gains to adjudication proceedings from the new process, as discussed above, should generally compensate for any delays associated with a more flexible deadline.

The new Rule 213(c) provides that, at the request of any party or on the Director or hearing officer's own motion, the Director or hearing officer (as applicable) may hear oral argument on a dispositive motion. Rule 213(c) is identical to the previous Rule 212(g), except that it is updated to reflect the fact that the Director would be the appropriate official to hear oral argument, if any, to the extent the Director is deciding the motion.

Finally, the new Rule 213(d) describes the types of rulings that the Director or hearing officer may make on a dispositive motion. It consolidates language from the previous Rules 212(h) and 213, with updates to reflect the fact that the Director may be the official who decides the motion, as well as other technical changes for clarity.

1081.400(a) Time period for filing preliminary findings and conclusions.

Under the previous 12 CFR 1081.400(a) (Rule 400(a)), subject to possible extensions, the hearing officer was required to file a recommended decision no later than 90 days after the deadline for filing post-hearing responsive briefs pursuant to 12 CFR 1081.305(b) (Rule 305(b)) and in no event later than 300 days after filing of the notice of charges. The Bureau is amending the latter, 300-day interval to 360 days, in light of the amendments to Rule 209 that expand the opportunities for depositions. Additionally, as explained later in this section-by-section analysis, the Bureau is changing terminology from "recommended decision" to "preliminary findings and conclusions" throughout the Rules of Practice.

1081.408 Issue exhaustion.

The Bureau is adding a new 12 CFR 1081.408 (Rule 408) to address issue exhaustion.

As the Supreme Court has explained: "Administrative review schemes commonly require parties to give the agency an opportunity to address an issue before seeking judicial

review of that question."[31] These requirements can be "creatures of statute or regulation" or else are "judicially created."[32] It is "common for an agency's regulations to require issue exhaustion in administrative appeals. And when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues."[33] Consistent with the Court's case law, the Administrative Conference of the United States has recommended that agencies address issue exhaustion requirements in their regulations.[34]

The Bureau is now adopting an express regulation on issue exhaustion. Section 1053 of the CFPA contemplates that the Bureau will conduct a proceeding to decide whether to issue a final order, and then parties may petition courts to review the Bureau's decision, based on the record that was before the Bureau.[35] But if parties do not adequately present their arguments to the Bureau, it frustrates this statutory scheme. Accordingly, the Bureau believes that having procedures to address issue exhaustion in adjudication proceedings is important to carry out section 1053.[36] The Bureau also notes that having express procedures on this subject should benefit both the Bureau and the parties, by avoiding any potential confusion about how parties must raise arguments in adjudication proceedings.

Rule 408(a) defines the new Rule 408's scope. It applies to any argument to support a party's case or defense, including any argument that could be a basis for setting aside Bureau action under 5 U.S.C. 706 or any other source of law. This broad scope ensures that the Bureau has the opportunity to consider any issue affecting its proceedings.

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[31] *Carr* v. *Saul*, 141 S. Ct. 1352, 1358 (2021).

[32] *Id.*

[33] *Sims* v. *Apfel*, 530 U.S. 103, 108 (2000) (internal citation omitted).

[34] 86 FR 6612, 6619 (Jan. 22, 2021) (recommendation 2.k).

[35] *See generally* section 1053(b), 12 U.S.C. 5563(b).

[36] Section 1053(e), 12 U.S.C. 5563(e). The issue exhaustion provision is also independently authorized by section 1022(b)(1), 12 U.S.C. 5512(b)(1), based on either of two grounds. First, establishing orderly rules for issue exhaustion is appropriate to enable the Bureau to "administer and carry out the purposes and objectives of" section 1053, for the reasons discussed above and below. *Id.* Second, these issue-exhaustion rules "prevent evasions" of section 1053 and the Rules of Practice by some parties, who otherwise may not adequately present their arguments to the Bureau. *Id.*; *see Woodford* v. *Ngo*, 548 U.S. 81, 90 (2006) (explaining that "exhaustion requirements are designed to deal with parties who do not want to exhaust").

Rule 408(b) provides, first, that a party must raise an argument before the hearing officer, or else it is not preserved for later consideration by the Director. Second, a party must raise an argument before the Director, or else it is not preserved for later consideration by a court. This is consistent with the roles of the hearing officer and Director.[37]

Rule 408(c) provides that an argument must be raised in a manner that complies with the Rules of Practice and that provides a fair opportunity to consider the argument.

Finally, Rule 408(d) clarifies that the Director has discretion to consider an unpreserved argument, including by considering it in the alternative. It also clarifies that, if the Director considers an unpreserved argument in the alternative, the argument remains unpreserved. Because issue exhaustion requirements serve to protect the agency's processes, it is appropriate for the head of the agency to retain discretion to waive those issue exhaustion requirements in appropriate cases.[38] If a party believes that there is good cause for the issue exhaustion requirements to not be applied in a particular context, the proper course is to timely request that the Director exercise this discretion. The Director may also do so on the Director's own initiative. On the other hand, if the Director merely considers an unpreserved argument in the alternative, that should not be construed as a waiver by the Director of the party's failure to appropriately raise the argument.

Global technical amendments.

In addition to the specific changes outlined above, the Bureau is making certain technical amendments throughout the Rules of Practice.

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[37] The Bureau notes that in cases where Rule 408(b) interacts with the Bureau's revisions to Rule 213, it yields a common-sense result. If the Director rules on a dispositive motion under Rule 213 rather than referring it to the hearing officer, then the first sentence of Rule 408(b)—which normally requires parties to raise arguments before the hearing officer in the first instance—would be inapplicable to the Director's consideration of the motion. This is because the Director's ruling on the motion would not be "later" consideration by the Director after the hearing officer. On the other hand, the second sentence of Rule 408(b) would be applicable, and arguments not properly raised before the Director in briefing on the motion would not be preserved for later consideration by a court.

[38] *See*, *e.g.*, *Am. Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (It "is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.").

First, the Bureau is retitling the hearing officer's "recommended decision" as "preliminary findings and conclusions." The Bureau believes that this title is more descriptive of this component of an adjudication proceeding. This is a terminological change, and preliminary findings and conclusions remain a recommended decision for purposes of the Administrative Procedure Act.

Second, the Bureau is making changes to ensure that the language of the Rules of Practice is gender inclusive. Third, consistent with the current Federal Rules of Civil Procedure, the Bureau is replacing use of the term "shall" with the terms "must," "may," "will," or "should," depending on the context, because the term "shall" can sometimes be ambiguous.[39] Fourth, the amendments replace certain uses of the term "the Bureau" with either "the Director," "the Office of Administrative Adjudication," or "the Office of Enforcement," in order to avoid ambiguity about which Bureau organ is being referenced. Fifth, as also discussed in the section-by-section analysis for Rule 114(a), the Bureau is adjusting various time periods in the Rules of Practice. Finally, the Bureau is making technical changes to requirements in 12 CFR 1081.111(a), 1081.113(d)(2), and 1081.405(e) (Rules 111(a), 113(d)(2), and 405(e)) regarding filing of certain papers by the hearing officer and Director and service of those papers by the Office of Administrative Adjudication.

IV. Section 1022(b)(2) Analysis

In developing this rule, the Bureau has considered the rule's benefits, costs, and impacts in accordance with section 1022(b)(2)(A) of the CFPA.[40] In addition, the Bureau has consulted or offered to consult with the prudential regulators and the FTC, including regarding consistency

[39] Fed. R. Civ. P. 1, advisory committee's notes to 2007 amendment.

[40] 12 U.S.C. 5512(b)(2)(A).

of this rule with any prudential, market, or systemic objectives administered by those agencies, in accordance with section 1022(b)(2)(B) of the CFPA.[41]

As with the 2012 Rule, this rule neither imposes obligations on consumers, nor is it expected to affect their access to consumer financial products or services. For purposes of this 1022(b)(2) analysis, the Bureau compares the effect of the rule against the baseline of the Rules of Practice as they currently exist, as established by the 2012 Rule and amended by the 2014 Rule.

The Rules of Practice amended by this rule are intended to provide an expeditious decision-making process. An expeditious decision-making process may benefit both consumers and covered persons to the extent that it is used in lieu of proceedings initiated in federal district court. A clear and efficient process for the conduct of adjudication proceedings benefits consumers by providing a systematic process for protecting them from unlawful behavior. At the same time, a more efficient process affords covered persons with a cost-effective way to have their cases heard. The 2012 Rule adopted an affirmative disclosure approach to fact discovery, pursuant to which the Bureau makes available to respondents the information obtained by the Office of Enforcement from persons not employed by the Bureau prior to the institution of proceedings, in connection with the investigation leading to the institution of proceedings that is not otherwise privileged or protected from disclosure. This affirmative disclosure obligation was intended to substitute for the traditional civil discovery process, which can be both time-consuming and expensive. By changing this process to allow for a limited number of depositions by both the Office of Enforcement and respondents, the rule will increase the cost of the process in both time and money, relative to the baseline. At the same time, to the extent that a limited number of depositions makes hearings proceed more efficiently, the rule may reduce costs. In addition, since promulgating the 2012 Rule, the Bureau has only brought two cases through the

[41] 12 U.S.C. 5512(b)(2)(B). Whether section 1022(b)(2)(A) and section 1022(b)(2)(A)(B) are applicable to this rule is unclear, but in order to inform the rulemaking more fully the Bureau performed the described analysis and consultations.

administrative adjudication process from start to finish. As such, the Bureau expects there to be few cases in the future that would have benefited from the more limited deposition procedure in the 2012 Rule. The Bureau expects the amended procedure to still be faster and less expensive than discovery through a Federal district court. To the extent that adding additional discovery enables more cases that would otherwise be initiated in Federal court to instead be initiated through the administrative adjudication process, both consumers and covered persons will benefit.

In addition, in the 1022(b)(2) analysis for the 2012 Rule, the Bureau stated that a benefit of the Rule was its similarity to existing rules of the prudential regulators, the FTC, and the SEC. The SEC has since amended its rules, and many of the changes in these amendments will align the Bureau's rules with the new SEC rules and those of other agencies. The Rule's similarity to other agencies' rules should further reduce the expense of administrative adjudication for covered persons.

Further, these amendments have no unique impact on insured depository institutions or insured credit unions with less than $10 billion in assets described in section 1026(a) of the CFPA. Finally, the amendments do not have a unique impact on rural consumers.

V. Regulatory Requirements

As a rule of agency organization, procedure, or practice, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[42] However, the Bureau is accepting comments on the rule. If, based on the comments, the Bureau decides to make further amendments, the Bureau requests comment on whether those amendments should apply to any adjudication proceedings that may be pending at that time.

Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[43] Moreover, the Bureau's

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[42] 5 U.S.C. 553(b).

[43] 5 U.S.C. 603, 604.

Director certifies that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, an analysis is also not required for that reason.[44] The rule imposes compliance burdens only on the handful of entities that are respondents in adjudication proceedings or third-party recipients of discovery requests. Some of the handful of affected entities may be small entities under the Regulatory Flexibility Act, but they would represent an extremely small fraction of small entities in consumer financial services markets. Accordingly, the number of small entities affected is not substantial.

The Bureau has also determined that this rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[45]

List of Subjects in 12 CFR Part 1081

Administrative practice and procedure, Banks, banking, Consumer protection, Credit unions, Law enforcement, National banks, Savings associations, Trade practices.

Authority and Issuance

For the reasons set forth above, the Bureau revises 12 CFR part 1081 to read as follows:

PART 1081 – RULES OF PRACTICE FOR ADJUDICATION PROCEEDINGS

Subpart A – General Rules

Sec.

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[44] 5 U.S.C. 605(b).

[45] 44 U.S.C. 3501-3521.

Subpart B – Initiation of Proceedings and Prehearing Rules
Sec.

Subpart C – Hearings
Sec.

Subpart D – Decision and Appeals
Sec.

Subpart E - Temporary Cease-and-Desist Proceedings
Sec.

Authority: 12 U.S.C. 5512(b)(1), 5563(e).

Subpart A – General Rules

§ 1081.100 Scope of the rules of practice.

This part prescribes rules of practice and procedure applicable to adjudication proceedings authorized by section 1053 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563). The rules of practice in this part do not govern the conduct of Bureau investigations, investigational hearings or other proceedings that do not arise from proceedings after a notice of charges.

§ 1081.101 Expedition and fairness of proceedings.

To the extent practicable, consistent with requirements of law, the Bureau's policy is to conduct such adjudication proceedings fairly and expeditiously. In the conduct of such proceedings, the hearing officer and counsel for all parties must make every effort at each stage of a proceeding to avoid delay. With the consent of the parties, the Director, at any time, or the hearing officer at any time prior to the filing of the hearing officer's preliminary findings and conclusions, may change any time limit prescribed by this part.

§ 1081.102 Rules of construction.

For the purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neutral gender encompasses all three, if such use would be appropriate;

(c) Unless context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party; and

(d) To the extent this part uses terms defined by section 1002 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481), such terms have the same meaning as set forth therein, unless defined differently by §1081.103.

§ 1081.103 Definitions.

For the purposes of this part, unless explicitly stated to the contrary:

Adjudication proceeding means a proceeding conducted pursuant to section 1053 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563) and intended to lead to the formulation of a final order other than a temporary order to cease and desist issued pursuant to section 1053(c) of that Act (12 U.S.C. 5563(c)).

Bureau means the Consumer Financial Protection Bureau.

Chief hearing officer means the hearing officer charged with assigning hearing officers to specific proceedings, in the event there is more than one hearing officer available to the Bureau.

Counsel means any person representing a party pursuant to §1081.107.

Decisional employee means any employee of the Bureau who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Director or the hearing officer, respectively, in preparing orders, preliminary findings and conclusions, decisions, and other documents under this part.

Director means the Director of the Bureau or a person authorized to perform the functions of the Director in accordance with the law.

Enforcement counsel means any individual who files a notice of appearance as counsel on behalf of the Office of Enforcement in an adjudication proceeding.

Final order means an order issued by the Bureau with or without the consent of the respondent, which has become final, without regard to the pendency of any petition for reconsideration or review.

General Counsel means the General Counsel of the Bureau or any Bureau employee to whom the General Counsel has delegated authority to act under this part.

Hearing officer means an administrative law judge or any other person duly authorized to preside at a hearing.

Notice of charges means the pleading that commences an adjudication proceeding, as described in §1081.200, except that it does not include a stipulation and consent order under §1081.200(d).

Office of Administrative Adjudication means the office of the Bureau responsible for conducting adjudication proceedings.

Office of Enforcement means the office of the Bureau responsible for enforcement of Federal consumer financial law or other laws enforceable by the Bureau.

Party means the Office of Enforcement, any person named as a party in any notice of charges issued pursuant to this part, and, to the extent applicable, any person who intervenes in the proceeding pursuant to §1081.119(a) to seek a protective order.

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Person employed by the Bureau means Bureau employees, contractors, agents, and others acting for or on behalf of the Bureau, or at its direction, including consulting experts.

Respondent means the party named in the notice of charges.

State means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a-1(a).

§ 1081.104 Authority of the hearing officer.

(a) General rule. The hearing officer will have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay. No provision of this

part may be construed to limit the powers of the hearing officers provided by the Administrative Procedure Act, 5 U.S.C. 556, 557.

(b) Powers. The powers of the hearing officer include but are not limited to the power:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum*, and protective orders, as authorized by this part, and to quash or modify any such subpoenas or orders;

(3) To take depositions or cause depositions to be taken;

(4) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(5) To regulate the course of a proceeding and the conduct of parties and their counsel;

(6) To reject written submissions that materially fail to comply with the requirements of this part, and to deny confidential status to documents and testimony without prejudice until a party complies with all relevant rules of this chapter;

(7) To hold conferences for settlement, simplification of the issues, or any other proper purpose and require the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(8) To inform the parties as to the availability of one or more alternative means of dispute resolution, and to encourage the use of such methods;

(9) To certify questions to the Director for the Director's determination in accordance with the rules of this part;

(10) To consider and rule upon, as justice may require, all procedural and other motions appropriate in adjudication proceedings;

(11) To issue and file preliminary findings and conclusions;

(12) To recuse oneself by motion made by a party or on the hearing officer's own motion;

(13) To issue such sanctions against parties or their counsel as may be necessary to deter repetition of sanctionable conduct or comparable conduct by others similarly situated, as

provided for in this part or as otherwise necessary to the appropriate conduct of hearings and related proceedings, provided that no sanction will be imposed before providing the sanctioned person an opportunity to show cause why no such sanction should issue; and

(14) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 1081.105 Assignment, substitution, performance, disqualification of hearing officer.

(a) How assigned. In the event that more than one hearing officer is available to the Bureau for the conduct of proceedings under this part, the presiding hearing officer will be designated by the chief hearing officer, who will notify the parties of the hearing officer designated.

(b) Interference. Hearing officers will not be subject to the supervision or direction of, or responsible to, any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Bureau, and all direction by the Bureau to the hearing officer concerning any adjudication proceedings must appear in and be made part of the record.

(c) Disqualification of hearing officers. (1) When a hearing officer deems the hearing officer disqualified to preside in a particular proceeding, the hearing officer must issue a notice stating that the hearing officer is withdrawing from the matter and setting forth the reasons therefore.

(2) Any party who has a reasonable, good faith basis to believe that a hearing officer has a personal bias, or is otherwise disqualified from hearing a case, may make a motion to the hearing officer that the hearing officer withdraw. The motion must be accompanied by an affidavit setting forth the facts alleged to constitute grounds for disqualification. Such motion must be filed at the earliest practicable time after the party learns, or could reasonably have learned, of the alleged grounds for disqualification. If the hearing officer does not disqualify the hearing officer within 14 days, the hearing officer must certify the motion to the Director pursuant to §1081.211, together with any statement the hearing officer may wish to have

considered by the Director. The Director must promptly determine the validity of the grounds alleged, either directly or on the report of another hearing officer appointed to conduct a hearing for that purpose, and will either direct the reassignment of the matter or confirm the hearing officer's continued role in the matter.

(d) Unavailability of hearing officer. If the hearing officer withdraws or is otherwise unable to perform the duties of the hearing officer, the chief hearing officer or the Director will designate another hearing officer to serve.

§ 1081.106 Deadlines.

The deadlines for action by the hearing officer established by §§ 1081.203, 1081.205, 1081.211, 1081.212, and 1081.400, or elsewhere in this part, confer no substantive rights on respondents.

§ 1081.107 Appearance and practice in adjudication proceedings.

(a) Appearance before the Bureau or a hearing officer—(1) By attorneys. Any member in good standing of the bar of the highest court of any State may represent others before the Bureau if such attorney is not currently suspended or debarred from practice before the Bureau or by a court of the United States or of any State.

(2) By non-attorneys. So long as such individual is not currently suspended or debarred from practice before the Bureau:

(i) An individual may appear on the individual's own behalf;

(ii) A member of a partnership may represent the partnership;

(iii) A duly authorized officer of a corporation, trust, or association may represent the corporation, trust, or association; and

(iv) A duly authorized officer or employee of any government unit, agency, or authority may represent that unit, agency, or authority.

(3) Notice of appearance. Any individual acting as counsel on behalf of a party, including Enforcement counsel, must file a notice of appearance at or before the time that the

individual submits papers or otherwise appears on behalf of a party in the adjudication proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (2) of this section and is authorized to represent the particular party, and if applicable, must include the attorney's jurisdiction of admission or qualification, attorney identification number, and a statement by the appearing attorney attesting to the attorney's good standing within the legal profession. By filing a notice of appearance on behalf of a party in an adjudication proceeding, the counsel agrees and represents that counsel is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, counsel will, if required by the hearing officer, continue to accept service until a new counsel has filed a notice of appearance or until the represented party indicates that the party will proceed on a pro se basis. The notice of appearance must provide the representative's email address, telephone number, and business address and, if different from the representative's addresses, electronic or other address at which the represented party may be served.

(b) Sanctions. Dilatory, obstructionist, egregious, contemptuous, or contumacious conduct at any phase of any adjudication proceeding may be grounds for exclusion or suspension of counsel from the proceeding. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(c) Standards of conduct; disbarment. (1) All attorneys practicing before the Bureau must conform to the standards of ethical conduct required by the bars of which the attorneys are members.

(2) If for good cause shown, the Director believes that any attorney is not conforming to such standards, or that an attorney or counsel to a party has otherwise engaged in conduct warranting disciplinary action, the Director may issue an order requiring such person to show cause why the attorney should not be suspended or disbarred from practice before the Bureau. The alleged offender will be granted due opportunity to be heard in the alleged offender's own

defense and may be represented by counsel. Thereafter, if warranted by the facts, the Director may issue against the attorney or counsel an order of reprimand, suspension, or disbarment.

§ 1081.108 Good faith certification.

(a) General requirement. Every filing or submission of record following the issuance of a notice of charges must be signed by at least one counsel of record in counsel's individual name and must state counsel's address, email address, and telephone number. A party who acts as the party's own counsel must sign the party's individual name and state the party's address, email address, and telephone number on every filing or submission of record. Papers filed by electronic transmission may be signed with an "/s/" notation, which will be deemed the signature of the party or representative whose name appears below the signature line.

(b) Effect of signature. (1) The signature of counsel or a party constitutes a certification that: the counsel or party has read the filing or submission of record; to the best of one's knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the hearing officer must strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the filer.

(c) Effect of making oral motion or argument. The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of one's knowledge, information, and belief formed after reasonable inquiry, one's statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(d) Sanctions. Counsel or a party that fails to abide by the requirements of this section may be subject to sanctions pursuant to § 1081.104(b)(13).

§ 1081.109 Conflict of interest.

(a) Conflict of interest in representation. No person may appear as counsel for another person in an adjudication proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The hearing officer may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) Certification and waiver. If any person appearing as counsel represents two or more parties to an adjudication proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 1081.107(a)(3):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and/or non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any conflicts of interest during the course of the proceeding.

§ 1081.110 Ex parte communication.

(a) Definitions. (1) For purposes of this section, ex parte communication means any material oral or written communication relevant to the merits of an adjudication proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person not employed by the Bureau (including such person's counsel); and

(ii) The hearing officer handling the proceeding, the Director, or a decisional employee.

(2) A request for status of the proceeding does not constitute an ex parte communication.

(3) Pendency of an adjudication proceeding means the time from when the Bureau issues a notice of charges, unless the person responsible for the communication has knowledge that a notice of charges will be issued, in which case the pendency of an adjudication will commence at the time of that person's acquisition of such knowledge, or from when an order by a court of competent jurisdiction remanding a Bureau decision and order for further proceedings becomes effective, until the time the Director enters a final decision and order in the proceeding and the time permitted to seek reconsideration of that decision and order has elapsed. For purposes of this section, an order of remand by a court of competent jurisdiction is deemed to become effective when the Bureau's right to petition for review or for a writ of certiorari has lapsed without a petition having been filed, or when such a petition has been denied. If a petition for reconsideration of a Bureau decision is filed pursuant to § 1081.406, the matter will be considered to be a pending adjudication proceeding until the time the Bureau enters an order disposing of the petition.

(b) Prohibited ex parte communications. During the pendency of an adjudication proceeding, except to the extent required for the disposition of ex parte matters as authorized by law or as otherwise authorized by this part:

(1) No interested person not employed by the Bureau will make or knowingly cause to be made to the Director, or to the hearing officer, or to any decisional employee, an ex parte communication; and

(2) The Director, the hearing officer, or any decisional employee will not make or knowingly cause to be made to any interested person not employed by the Bureau any ex parte communication.

(c) Procedure upon occurrence of ex parte communication. If an ex parte communication prohibited by paragraph (b) of this section is received by the hearing officer, the Director, or any decisional employee, that person must cause all such written communications (or, if the

communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding will have an opportunity, within 14 days of receipt of service of the ex parte communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) Sanctions—(1) Adverse action on claim. Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party and prohibited by paragraph (b) of this section, the Director or hearing officer, as appropriate, may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Discipline of persons practicing before the Bureau. The Director may, to the extent not prohibited by law, censure, suspend, or revoke the privilege to practice before the Bureau of any person who makes, or solicits the making of, an unauthorized ex parte communication.

(e) Separation of functions. Except to the extent required for the disposition of ex parte matters as authorized by law, the hearing officer may not consult a person or party on any matter relevant to the merits of the adjudication, unless upon notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the Bureau in a case, other than the Director, may not, in that or a factually related case, participate or advise in the decision, preliminary findings and conclusions, or agency review of the preliminary findings and conclusions, except as witness or counsel in public proceedings.

§ 1081.111 Filing of papers.

(a) Filing. The following papers must be filed by parties in an adjudication proceeding: the notice of charges, proof of service of the notice of charges, notices of appearance, answer, the disclosure statement required under § 1081.201(e), motion, brief, request for issuance or

enforcement of a subpoena, response, opposition, reply, notice of appeal, or petition for reconsideration. The hearing officer or Director (as applicable) will file all written orders, rulings, notices, or requests. Any papers required to be filed must be filed with the Office of Administrative Adjudication, except as otherwise provided in this section.

(b) Manner of filing. Unless otherwise specified by the Director or the hearing officer, filing may be accomplished by:

(1) Electronic transmission in accordance with guidance issued by the Office of Administrative Adjudication; or

(2) Any of the following methods if respondent demonstrates, in accordance with guidance issued by the Office of Administrative Adjudication, that electronic filing is not practicable:

(i) Personal delivery;

(ii) Delivery to a reliable commercial courier service or overnight delivery service; or

(iii) Mailing the papers through the U.S. Postal Service by First Class Mail, Registered Mail, Certified Mail or Express Mail.

(c) Papers filed in an adjudication proceeding are presumed to be public. Unless otherwise ordered by the Director or the hearing officer, all papers filed in connection with an adjudication proceeding are presumed to be open to the public. The Bureau may provide public access to and publish any papers filed in an adjudication proceeding except if there is a pending motion for a protective order filed pursuant to § 1081.119, or if there is an order from the Director, hearing officer, or a Federal court authorizing the confidential treatment of the papers filed.

§ 1081.112 Formal requirements as to papers filed.

(a) Form. All papers filed by parties must:

(1) Set forth the name, address, telephone number, and email address of the counsel or party making the filing;

(2) Be double-spaced (except for single-spaced footnotes and single-spaced indented quotations) and printed or typewritten on 8½ x 11 inch paper in 12-point or larger font;

(3) Include at the head of the paper, or on a title page, a caption setting forth the title of the case, the docket number of the proceeding, and a brief descriptive title indicating the purpose of the paper;

(4) Be paginated with margins at least one inch wide; and

(5) If filed by other than electronic means, be stapled, clipped, or otherwise fastened in a manner that lies flat when opened.

(b) Signature. All papers must be dated and signed as provided in § 1081.108.

(c) Number of copies. Unless otherwise specified by the Director or the hearing officer, one copy of all documents and papers must be filed if filing is by electronic transmission. If filing is accomplished by any other means, an original and one copy of all documents and papers must be filed, except that only one copy of transcripts of testimony and exhibits must be filed.

(d) Authority to reject document for filing. The Office of Administrative Adjudication or the hearing officer may reject a document for filing that materially fails to comply with this part.

(e) Sensitive personal information. Sensitive personal information means an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, State-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. Sensitive personal information must not be included in, and must be redacted or omitted from, filings unless the person filing the paper determines that such information is relevant or otherwise necessary for the conduct of the proceeding. If the person filing a paper determines the sensitive personal information contained in the paper is relevant or necessary to the proceeding, the person must file the paper in accordance with paragraph (f) of this section, including filing an expurgated copy of the paper with the sensitive personal information redacted.

(f) Confidential treatment of information in certain filings. A party seeking confidential treatment of information contained in a filing must contemporaneously file either a motion requesting such treatment in accordance with § 1081.119 or a copy of the order from the Director, hearing officer, or Federal court authorizing such confidential treatment. The filing must comply with any applicable order of the Director or hearing officer and must be accompanied by:

(1) A complete, sealed copy of the documents containing the materials as to which confidential treatment is sought, with the allegedly confidential material clearly marked as such, and with the first page of the document labeled "Under Seal." If the movant seeks or has obtained a protective order against disclosure to other parties as well as the public, copies of the documents will not be served on other parties; and

(2) An expurgated copy of the materials as to which confidential treatment is sought, with the allegedly confidential materials redacted. The redacted version must indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page must be identical to that of the sealed version.

(g) Certificate of service. Any papers filed in an adjudication proceeding must contain proof of service on all other parties or their counsel in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The certificate of service must be affixed to the papers filed and signed in accordance with § 1081.108.

§ 1081.113 Service of papers.

(a) When required. In every adjudication proceeding, each paper required to be filed by § 1081.111 must be served upon each party in the proceeding in accordance with the provisions of this section; provided, however, that absent an order to the contrary, no service is required for motions which are to be heard ex parte.

(b) Upon a person represented by counsel. Whenever service is required to be made upon

a person represented by counsel who has filed a notice of appearance pursuant to § 1081.107(a)(3), service shall be made pursuant to paragraph (c) of this section upon counsel, unless service upon the person represented is ordered by the Director or the hearing officer, as appropriate.

(c) Method of service. Except as provided in paragraph (d) of this section or as otherwise ordered by the hearing officer or the Director, service must be made by delivering a copy of the filing by one of the following methods:

(1) Transmitting the papers by electronic transmission where the persons so serving each other have consented to service by specified electronic transmission and provided the Bureau and the parties with notice of the means for service by electronic transmission (e.g., email address or facsimile number);

(2) Handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling or usual place of abode with some person of suitable age and discretion then residing therein;

(3) Mailing the papers through the U.S. Postal Service by First Cass Mail, Registered Mail, Certified Mail or Express Mail delivery addressed to the person; or

(4) Sending the papers through a third-party commercial courier service or express delivery service.

(d) Service of certain papers by the Office of Enforcement or the Office of Administrative Adjudication—(1) Service of a notice of charges by the Office of Enforcement—(i) To individuals. Notice of a proceeding shall be made to an individual by delivering a copy of the notice of charges to the individual or to an agent authorized by appointment or by law to receive such notice. Delivery, for purposes of this paragraph (d)(1)(i), means handing a copy of the notice to the individual; or leaving a copy at the individual's office with a clerk or other

person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of the notice addressed to the individual through the U.S. Postal Service by Registered Mail, Certified Mail or Express Mail delivery, or by third-party commercial carrier, for overnight delivery and obtaining a confirmation of receipt.

(ii) To corporations or entities. Notice of a proceeding must be made to a person other than a natural person by delivering a copy of the notice of charges to an officer, managing or general agent, or any other agent authorized by appointment or law to receive such notice, by any method specified in paragraph (d)(1)(i) of this section.

(iii) Upon persons registered with the Bureau. In addition to any other method of service specified in paragraph (d)(1)(i) or (ii) of this section, notice may be made to a person currently registered with the Bureau by sending a copy of the notice of charges addressed to the most recent business address shown on the person's registration form by U.S. Postal Service certified, registered, or Express Mail and obtaining a confirmation of receipt or attempted delivery.

(iv) Upon persons in a foreign country. Notice of a proceeding to a person in a foreign country may be made by any method specified in paragraph (d)(1) of this section, or by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

(v) Record of service. The Office of Enforcement will maintain and file a record of service of the notice of charges on parties, identifying the party given notice, the method of service, the date of service, the address to which service was made, and the person who made service. If service is made in person, the certificate of service must state, if available, the name of the individual to whom the notice of charges was given. If service is made by U.S. Postal Service Registered Mail, Certified Mail, or Express Mail, the Office of Enforcement will maintain the confirmation of receipt or attempted delivery. If service is made to an agent authorized by appointment to receive service, the certificate of service must be accompanied by

evidence of the appointment.

(vi) Waiver of service. In lieu of service as set forth in paragraph (d)(1)(i) or (ii) of this section, the party may be provided a copy of the notice of charges by First Class Mail or other reliable means if a waiver of service is obtained from the party and placed in the record.

(2) Service of papers by the Office of Administrative Adjudication. Unless otherwise ordered by the hearing officer or Director, the Office of Administrative Adjudication must serve papers filed by the hearing officer or Director promptly on each party pursuant to any method of service authorized under paragraph (c) or (d)(1) of this section. Unless otherwise ordered by the hearing officer or Director, if a party is represented by counsel who has filed a notice of appearance pursuant to § 1081.107(a)(3), the Office of Administrative Adjudication serves that party by serving its counsel.

§ 1081.114 Construction of time limits.

(a) General rule. In computing any time period prescribed by this part, by order of the Director or a hearing officer, or by any applicable statute, exclude the day of the event that triggers the period, count every day, including intermediate Saturdays, Sundays, and Federal holidays, and include the last day of the period unless it is a Saturday, Sunday, or Federal holiday as set forth in 5 U.S.C. 6103(a). When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday.

(b) When papers are deemed to be filed or served. Filing and service are deemed to be effective:

(1) In the case of personal service or same day commercial courier delivery, upon actual receipt by person served;

(2) In the case of overnight commercial delivery service, Express Mail delivery, First Class Mail, Registered Mail, or Certified Mail, upon deposit in or delivery to an appropriate point of collection; or

(3) In the case of electronic transmission, upon transmission.

(c) Calculation of time for service and filing of responsive papers. Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by First Class Mail, Registered Mail, or Certified Mail, add three calendar days to the prescribed period;

(2) If service is made by Express Mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic transmission, add one calendar day to the prescribed period.

§ 1081.115 Change of time limits.

(a) Generally. Except as otherwise provided by law, the hearing officer may, in any proceeding before him or her, for good cause shown, extend the time limits prescribed by this part or by any notice or order issued in the proceedings. After appeal to the Director pursuant to § 1081.402, the Director may grant extensions of the time limits for good cause shown. Extensions may be granted on the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Director's or the hearing officer's own motion, as appropriate.

(b) Considerations in determining whether to extend time limits or grant postponements, adjournments and extensions. Motions for extensions of time filed pursuant to paragraph (a) of this section are generally disfavored. In determining whether to grant any motions, the Director or hearing officer, as appropriate, will consider, in addition to any other relevant factors:

(1) The length of the proceeding to date;

(2) The number of postponements, adjournments or extensions already granted;

(3) The stage of the proceedings at the time of the motion;

(4) The impact of the motion on the hearing officer's ability to complete the proceeding in the time specified by § 1081.400(a); and

(5) Any other matters as justice may require.

(c) Time limit. Postponements, adjournments, or extensions of time for filing papers may not exceed 21 days unless the Director or the hearing officer, as appropriate, states on the record or sets forth in a written order the reasons why a longer period of time is necessary.

(d) No effect on deadline for preliminary findings and conclusions. The granting of any extension of time pursuant to this section does not affect any deadlines set pursuant to § 1081.400(a).

§ 1081.116 Witness fees and expenses.

Respondents must pay to witnesses subpoenaed for testimony or depositions on their behalf the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a deposition subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses must be tendered in advance by any respondent requesting the issuance of a subpoena, except that fees and mileage need not be tendered in advance where the Office of Enforcement is the party requesting the subpoena. The Bureau must pay to witnesses subpoenaed for testimony or depositions on behalf of the Office of Enforcement the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, but the Bureau need not tender such fees in advance.

§ 1081.117 Bureau's right to conduct examination, collect information.

Nothing contained in this part limits in any manner the right of the Bureau to conduct any examination, inspection, or visitation of any person, to conduct or continue any form of investigation authorized by law, to collect information in order to monitor the market for risks to consumers in the offering or provision of consumer financial products or services, or to otherwise gather information in accordance with law.

§ 1081.118 Collateral attacks on adjudication proceedings.

Unless a court of competent jurisdiction, or the Director for good cause, so directs, if an

interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudication proceeding, the challenged adjudication proceeding will continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudication proceeding within the times prescribed in this part will be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 1081.119 Confidential information; protective orders.

(a) Rights of third parties. Any party that intends to disclose information obtained from a third party that is subject to a claim of confidentiality must provide notice to the third party at least seven days prior to the proposed disclosure of such information. In response to such notice, the third party may consent to the disclosure of such information, which may be conditioned on the entry of an appropriate protective order, or may intervene in the proceeding for the limited purpose of moving for a protective order pursuant to this section. Any written filing by a party that contains such confidential information must be accompanied by a certification that proper notice was provided. The act of making any oral motion or oral argument by any counsel or party which contains such confidential information constitutes a certification that proper notice was provided. A third party wishing to intervene for purposes of protecting its confidential information may file a single motion, in conformity with all applicable rules, setting forth the basis of both the third party's right to intervene and the basis for the protective order, in conformity with paragraph (b) of this section.

(b) Procedure. In any adjudication proceeding, a party, including a third party who has intervened pursuant to paragraph (a) of this section, may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information. The motion should include a general summary or extract of the documents or testimony without revealing confidential details, and a copy of the proposed protective order. A motion for confidential treatment of documents should be filed in accordance with § 1081.112(f), and all other applicable rules of this chapter.

(c) Basis for issuance. Documents and testimony introduced in a public hearing, or filed in connection with an adjudication proceeding, are presumed to be public. A motion for a protective order will be granted:

(1) Upon a finding that public disclosure will likely result in a clearly defined, serious injury to the party or third party requesting confidential treatment;

(2) After finding that the material constitutes sensitive personal information, as defined in § 1081.112(e);

(3) If all parties, including third parties to the extent their information is at issue, stipulate to the entry of a protective order; or

(4) Where public disclosure is prohibited by law.

(d) Requests for additional information supporting confidentiality. The hearing officer may require a movant under paragraph (b) of this section to furnish in writing additional information with respect to the grounds for confidentiality. Failure to supply the information so requested within seven days from the date of receipt by the movant of a notice of the information required will be deemed a waiver of the objection to public disclosure of that portion of the documents to which the additional information relates, unless the hearing officer otherwise orders for good cause shown at or before the expiration of such seven-day period.

(e) Confidentiality of documents pending decision. Pending a determination of a motion under this section, the documents as to which confidential treatment is sought and any other documents that would reveal the confidential information in those documents will be maintained under seal and may be disclosed only in accordance with orders of the hearing officer. Any order issued in connection with a motion under this section will be public unless the order would disclose information as to which a protective order has been granted, in which case that portion of the order that would reveal the protected information will be nonpublic.

§ 1081.120 Settlement.

(a) Availability. Any respondent in an adjudication proceeding instituted under this part,

may, at any time, propose in writing an offer of settlement.

(b) Procedure. An offer of settlement must state that it is made pursuant to this section; must recite or incorporate as a part of the offer the provisions of paragraphs (c)(3) and (4) of this section; must be signed by the person making the offer, not by counsel; and must be submitted to enforcement counsel.

(c) Consideration of offers of settlement. (1) Offers of settlement will be considered when time, the nature of the proceedings, and the public interest permit.

(2) Any settlement offer will be presented to the Director with a recommendation, except that, if the recommendation is unfavorable, the offer will not be presented to the Director unless the person making the offer so requests.

(3) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer:

(i) All hearings pursuant to the statutory provisions under which the proceeding has been instituted;

(ii) The filing of proposed findings of fact and conclusions of law;

(iii) Proceedings before, and preliminary findings and conclusions by, a hearing officer;

(iv) All post-hearing procedures;

(v) Judicial review by any court; and

(vi) Any objection to the jurisdiction of the Bureau under section 1053 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563).

(4) By submitting an offer of settlement the person further waives:

(i) Such provisions of this part or other requirements of law as may be construed to prevent any Bureau employee from participating in the preparation of, or advising the Director as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) Any right to claim bias or prejudgment by the Director based on the consideration of

or discussions concerning settlement of all or any part of the proceeding.

(5) If the Director rejects the offer of settlement, the person making the offer will be notified of the Director's action and the offer of settlement will be deemed withdrawn. The rejected offer will not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(4) of this section with respect to any discussions concerning the rejected offer of settlement.

(d) Consent orders. If the Director accepts the offer of settlement, all terms and conditions of a settlement entered into under this section will be recorded in a written stipulation signed by each settling respondent, and a consent order concluding the proceeding as to the settling respondents. The stipulation and consent order must be filed pursuant to § 1081.111, and must recite or incorporate as a part of the stipulation the provisions of paragraphs (c)(3) and (4) of this section. The Director will then issue a consent order, which will be a final order concluding the proceeding as to the settling respondents.

§ 1081.121 Cooperation with other agencies.

It is the policy of the Bureau to cooperate with other governmental agencies to avoid unnecessary overlap or duplication of regulatory functions.

Subpart B – Initiation of Proceedings and Prehearing Rules

§ 1081.200 Commencement of proceeding and contents of notice of charges.

(a) Commencement of proceeding. A proceeding governed by subparts A through D of this part is commenced when the Bureau, through the Office of Enforcement, files a notice of charges in accordance with § 1081.111. The notice of charges must be served by the Office of Enforcement upon the respondent in accordance with § 1081.113(d)(1).

(b) Contents of a notice of charges. The notice of charges must set forth:

(1) The legal authority for the proceeding and for the Bureau's jurisdiction over the proceeding;

(2) A statement of the matters of fact and law showing that the Bureau is entitled to relief;

(3) A proposed order or request for an order granting the relief sought;

(4) The time and place of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) That the answer must be filed and served in accordance with subpart A of this part; and

(7) The docket number for the adjudication proceeding.

(c) Publication of notice of charges. Unless otherwise ordered by the Director, the notice of charges will be given general circulation by release to the public, by publication on the Bureau's website and, where directed by the hearing officer or the Director, by publication in the *Federal Register*. The Bureau may publish any notice of charges after 14 days from the date of service except if there is a pending motion for a protective order filed pursuant to § 1081.119.

(d) Commencement of proceeding through a consent order. Notwithstanding paragraph (a) of this section, where the parties agree to settlement before the filing of a notice of charges, a proceeding may be commenced by filing a stipulation and consent order. The stipulation and consent order must be filed pursuant to § 1081.111. The stipulation must contain the information required under § 1081.120(d), and the consent order must contain the information required under paragraphs (b)(1) and (2) of this section. The proceeding will be concluded upon issuance of the consent order by the Director.

(e) Voluntary dismissal—(1) Without an order. The Office of Enforcement may voluntarily dismiss an adjudication proceeding without an order entered by a hearing officer by filing either:

(i) A notice of dismissal before the respondent(s) serves an answer; or

(ii) A stipulation of dismissal signed by all parties who have appeared.

(2) Effect. Unless the notice or stipulation states otherwise, the dismissal is without

prejudice, and does not operate as an adjudication on the merits.

§ 1081.201 Answer and disclosure statement and notification of financial interest.

(a) Time to file answer. Within 14 days of service of the notice of charges, respondent must file an answer as designated in the notice of charges.

(b) Content of answer. An answer must specifically respond to each paragraph or allegation of fact contained in the notice of charges and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice of charges which is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice of charges that constitutes the request for relief or proposed order. A respondent must affirmatively state in the answer any avoidance or affirmative defense, including but not limited to res judicata and statute of limitations. Failure to do so will be deemed a waiver.

(c) If the allegations of the notice of charges are admitted. If the respondent elects not to contest the allegations of fact set forth in the notice of charges, the answer will consist of a statement that the respondent admits all the material allegations to be true. Such an answer constitutes a waiver of hearings as to the facts alleged in the notice of charges, and together with the notice of charges will provide a record basis on which the hearing officer will issue preliminary findings and conclusions, containing appropriate findings and conclusions and a proposed order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 1081.305.

(d) Default. (1) Failure of a respondent to file an answer within the time provided will be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the notice of charges and to authorize the hearing officer, without further notice to the

respondent, to find the facts to be as alleged in the notice of charges and to enter preliminary findings and conclusions containing appropriate findings and conclusions. In such cases, respondent will have no right to appeal pursuant to § 1081.402, but must instead proceed pursuant to paragraph (d)(2) of this section.

(2) A motion to set aside a default must be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the preliminary findings and conclusions, or the Director, at any time, may for good cause shown set aside a default.

(e) Disclosure statement and notification of financial interest—(1) Who must file; contents. A respondent, nongovernmental intervenor, or nongovernmental amicus must file a disclosure statement and notification of financial interest that:

(i) Identifies any parent corporation, any publicly owned corporation owning ten percent or more of its stock, and any publicly owned corporation not a party to the proceeding that has a financial interest in the outcome of the proceeding and the nature of that interest; or

(ii) States that there are no such corporations.

(2) Time for filing; supplemental filing. A respondent, nongovernmental intervenor, or nongovernmental amicus must:

(i) File the disclosure statement with its first appearance, pleading, motion, response, or other request addressed to the hearing officer or the Bureau; and

(ii) Promptly file a supplemental statement if any required information changes.

§ 1081.202 Amended pleadings.

(a) Amendments before the hearing. The notice of charges, answer, or any other pleading may be amended or supplemented only with the opposing party's written consent or leave of the hearing officer. The respondent must answer an amended notice of charges within the time remaining for the respondent's answer to the original notice of charges, or within 14 days after

service of the amended notice of charges, whichever is later, unless the hearing officer orders otherwise for good cause.

(b) Amendments to conform to the evidence. When issues not raised in the notice of charges or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice of charges or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice of charges or answer, the hearing officer may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the hearing officer that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The hearing officer may grant a continuance to enable the objecting party to meet such evidence.

§ 1081.203 Scheduling conference.

(a) Meeting of the parties before scheduling conference. As early as practicable before the scheduling conference described in paragraph (e) of this section, counsel for the parties must meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. The parties must also discuss and agree, if possible, on the matters set forth in paragraph (e) of this section.

(b) Scheduling conference disclosure. After the meeting required in paragraph (a) of this section and at least seven days prior to the scheduling conference described in paragraph (e) of this section, the parties must exchange a scheduling conference disclosure, which must be signed by the party or by the party's attorney if one has appeared on behalf of the party. The scheduling conference disclosure must include:

(1) A factual summary of the case, a summary of all factual and legal issues in dispute, and a summary of all factual and legal bases supporting each defense; and

(2) The following information about the evidence that the party may present at the hearing other than solely for impeachment:

(i) The name, address, and telephone number of each witness, together with a summary of the witness's anticipated testimony; and

(ii) An identification of each document or other exhibit, including summaries of other evidence, along with a copy of each document or exhibit identified unless the document or exhibit has already been produced to the other party.

(c) Duty to supplement. A party must supplement or correct the scheduling conference disclosure in a timely manner if the party acquires other information that it intends to rely upon at a hearing.

(d) Failure to disclose – harmless error. In the event that information required to be disclosed in the scheduling conference disclosure is not disclosed, no rehearing or redecision of a proceeding already heard or decided will be required unless the other party establishes that the failure to disclose was not harmless error.

(e) Scheduling conference. Within 21 days of service of the notice of charges or such other time as the parties and hearing officer may agree, counsel for all parties must appear before the hearing officer in person at a specified time and place or by electronic means for the purpose of scheduling the course and conduct of the proceeding. This meeting is called a scheduling conference. At the scheduling conference, counsel for the parties must be prepared to address:

(1) Determination of the dates and location of the hearing, including, in proceedings under section 1053(b) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(b)), whether the hearing should commence later than 60 days after service of the notice of charges, considering, among other factors, whether the respondent intends to file a dispositive motion or to seek the issuance of subpoenas;

(2) Simplification and clarification of the issues;

(3) Amendments to pleadings;

(4) Settlement of any or all issues;

(5) Production of documents as set forth in § 1081.206 and of witness statements as set forth in § 1081.207, and prehearing production of documents in response to subpoenas *duces tecum* as set forth in § 1081.208;

(6) Whether the parties intend to file dispositive motions;

(7) Whether the parties intend to seek the issuance of subpoenas, the identity of any anticipated deponents or subpoena recipients, and a schedule for completing that discovery;

(8) A schedule for the exchange of expert reports and the taking of expert depositions, if any; and

(9) Such other matters as may aid in the orderly disposition of the proceeding.

(f) Transcript. The hearing officer may require that a scheduling conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at that party's expense.

(g) Scheduling order. At or within seven days following the conclusion of the scheduling conference, the hearing officer will serve on each party an order setting forth the date and location of the hearing and any agreements reached and any procedural determinations made.

(h) Failure to appear, default. Any person who is named in a notice of charges as a person against whom findings may be made or sanctions imposed and who fails to appear, in person or through counsel, at a scheduling conference of which the person has been duly notified may be deemed in default pursuant to § 1081.201(d)(1). A party may make a motion to set aside a default pursuant to § 1081.201(d)(2).

(i) Public access. The scheduling conference will be public unless the hearing officer determines, based on the standard set forth in § 1081.119(c), that the conference (or any part thereof) should be closed to the public.

§ 1081.204 Consolidation, severance, or bifurcation of proceedings.

(a) Consolidation. (1) On the motion of any party, or on the hearing officer's own

motion, the hearing officer may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule may be made to avoid unnecessary expense, inconvenience, or delay.

(b) Severance. The hearing officer may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the hearing officer finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

(c) Bifurcation. The Director may order that the proceeding be divided into two or more stages, if the Director determines that it would promote efficiency in the proceeding or for other good cause. For example, the Director may order that the proceeding have two stages, so that at the conclusion of the first stage the Director issues a decision on whether there have been violations of law and at the conclusion of the second stage the Director issues a final decision and order, including with respect to any remedies. The Director may make an order under this paragraph (c) either on the motion of a party or on the Director's own motion after inviting submissions by the parties. The Director may include, in that order or in later orders, modifications to the procedures in this part in order to effectuate an efficient division into stages, or the Director may assign such authority to the hearing officer. Only the decision and order of the Director after the final stage, and not a decision of the Director after an earlier stage, will be a

final decision and order for purposes of §§ 1081.110, 1081.405(d) and (e), 1081.407, and 1081.502 and section 1053(b) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(b)).

§ 1081.205 Non-dispositive motions.

(a) Scope. This section applies to all motions except motions to dismiss and motions for summary disposition. A non-dispositive motion filed pursuant to another section of this part must comply with any specific requirements of that section and this section to the extent the requirements in this section are not inconsistent.

(b) In writing. (1) Unless made during a hearing or conference, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the hearing officer. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(c) Oral motions. The Director or the hearing officer, as appropriate, may order that an oral motion be submitted in writing.

(d) Responses and replies. (1) Except as otherwise provided in this section, within 14 days after service of any written motion, or within such other period of time as may be established by the hearing officer or the Director, as appropriate, any party may file a written response to a motion. The hearing officer will not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) Reply briefs, if any, may be filed within seven days after service of the response.

(3) The failure of a party to oppose a written motion or an oral motion made on the record is deemed consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) Length limitations. No motion subject to this section (together with the brief in support of the motion) or brief in response to the motion may exceed 15 pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. No reply brief may exceed six pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. Motions for leave to file motions and briefs in excess of these limitations are disfavored.

(f) Meet and confer requirements. Each motion filed under this section must be accompanied by a signed statement representing that counsel for the moving party has conferred or made a good faith effort to confer with opposing counsel in a good faith effort to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement must specify the matters so resolved and the matters remaining unresolved.

(g) Ruling on non-dispositive motions. Unless otherwise provided by a relevant section of this part, a hearing officer will rule on non-dispositive motions. Such ruling must be issued within 14 days after the expiration of the time period allowed for the filing of all motion papers authorized by this section. The Director, for good cause, may extend the time allowed for a ruling.

(h) Proceedings not stayed. A motion under consideration by the Director or the hearing officer does not stay proceedings before the hearing officer unless the Director or the hearing officer, as appropriate, so orders.

(i) Dilatory motions. Frivolous, dilatory, or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

§ 1081.206 Availability of documents for inspection and copying.

For purposes of this section, the term documents includes any book, document, record, report, memorandum, paper, communication, tabulation, chart, logs, electronic files, or other data or data compilations stored in any medium.

(a) Documents to be available for inspection and copying. (1) Unless otherwise provided by this section, or by order of the hearing officer, the Office of Enforcement will make available for inspection and copying by any respondent documents obtained by the Office of Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings. Such documents will include:

(i) Any documents turned over in response to civil investigative demands or other written requests to provide documents or to be interviewed issued by the Office of Enforcement;

(ii) All transcripts and transcript exhibits; and

(iii) Any other documents obtained from persons not employed by the Bureau.

(2) In addition, the Office of Enforcement will make available for inspection and copying by any respondent:

(i) Each civil investigative demand or other written request to provide documents or to be interviewed issued by the Office of Enforcement in connection with the investigation leading to the institution of proceedings; and

(ii) Any final examination or inspection reports prepared by any other Office of the Bureau if the Office of Enforcement either intends to introduce any such report into evidence or to use any such report to refresh the recollection of, or impeach, any witness.

(3) Nothing in paragraph (a) of this section limits the right of the Office of Enforcement to make available any other document, or limits the right of a party to seek access to or production pursuant to subpoena of any other document, or limits the authority of the hearing officer to order the production of any document pursuant to subpoena.

(4) Nothing in paragraph (a) of this section requires the Office of Enforcement to produce a final examination or inspection report prepared by any other Office of the Bureau or any other government agency to a respondent who is not the subject of that report.

(b) Documents that may be withheld. (1) The Office of Enforcement may withhold a document if:

(i) The document is privileged;

(ii) The document is an internal memorandum, note, or writing prepared by a person employed by the Bureau or another Government agency, other than an examination or supervision report as specified in paragraph (a)(2)(ii) of this section, or would otherwise be subject to the work product doctrine and will not be offered in evidence;

(iii) The document was obtained from a domestic or foreign governmental entity and is either not relevant to the resolution of the proceeding or was provided on condition that the information not be disclosed;

(iv) The document would disclose the identity of a confidential source;

(v) Applicable law prohibits the disclosure of the document;

(vi) The document reflects only settlement negotiations between the Office of Enforcement and a person or entity who is not a current respondent in the proceeding; or

(vii) The hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

(2) Nothing in paragraph (b)(1) of this section authorizes the Office of Enforcement in connection with an adjudication proceeding to withhold material exculpatory evidence in the possession of the Office that would otherwise be required to be produced pursuant to paragraph (a) of this section.

(c) Withheld document list. The hearing officer may require the Office of Enforcement to produce a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i) through (vi) of this section or to submit to the hearing officer any document withheld,

except for any documents that are being withheld pursuant to paragraph (b)(1)(iii) of this section, in which case the Office of Enforcement must inform the other parties of the fact that such documents are being withheld, but no further disclosures regarding those documents will be required. The hearing officer may determine whether any withheld document should be made available for inspection and copying. When similar documents are withheld pursuant to paragraphs (b)(1)(i) through (vi) of this section, those documents may be identified by category instead of by individual document. The hearing officer retains discretion to determine when an identification by category is insufficient.

(d) Timing of inspection and copying. Unless otherwise ordered by the hearing officer, the Office of Enforcement must commence making documents available to a respondent for inspection and copying pursuant to this section no later than 14 days after service of the notice of charges.

(e) Place of inspection and copying. Documents subject to inspection and copying pursuant to this section will be made available to the respondent for inspection and copying at the Bureau office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A respondent will not be given custody of the documents or leave to remove the documents from the Bureau's offices pursuant to the requirements of this section other than by written agreement of the Office of Enforcement. Such agreement must specify the documents subject to the agreement, the date they must be returned, and such other terms or conditions as are appropriate to provide for the safekeeping of the documents. If the Office of Enforcement determines that production of some or all the documents required to be produced under this section can be produced in an electronic format, the Office of Enforcement may instead produce the documents in an electronic format.

(f) Copying costs and procedures. The respondent may obtain a photocopy of any documents made available for inspection or, at the discretion of the Office of Enforcement, electronic copies of such documents. The respondent is responsible for the cost of photocopying.

Unless otherwise ordered, charges for copies made by the Office of Enforcement at the request of the respondent will be at the rate charged pursuant to part 1070 of this chapter. The respondent will be given access to the documents at the Bureau's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) Duty to supplement. If the Office of Enforcement acquires information that it intends to rely upon at a hearing after making its disclosures under paragraph (a)(1) of this section, the Office of Enforcement must supplement its disclosures to include such information.

(h) Failure to make documents available – harmless error. In the event that a document required to be made available to a respondent pursuant to this section is not made available by the Office of Enforcement, no rehearing or redecision of a proceeding already heard or decided will be required unless the respondent establishes that the failure to make the document available was not harmless error.

(i) Disclosure of privileged or protected information or communications; scope of waiver; obligations of receiving party. (1) The disclosure of privileged or protected information or communications by any party during an adjudication proceeding does not operate as a waiver if:

(i) The disclosure was inadvertent;

(ii) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(iii) The holder promptly took reasonable steps to rectify the error, including notifying any party that received the information or communication of the claim and the basis for it.

(2) After being notified, the receiving party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the hearing officer under seal

for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(3) The disclosure of privileged or protected information or communications by any party during an adjudication proceeding will waive the privilege or protection, with respect to other parties to the proceeding, as to undisclosed information or communications only if:

(i) The waiver is intentional;

(ii) The disclosed and undisclosed information or communications concern the same subject matter; and

(iii) They ought in fairness to be considered together.

§ 1081.207 Production of witness statements.

(a) Availability. Any respondent may move that the Office of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the Office of Enforcement that pertains, or is expected to pertain, to the witness's direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500, if the adjudication proceeding were a criminal proceeding. For purposes of this section, the term "statement" has the meaning set forth in 18 U.S.C. 3500(e). Such production will be made at a time and place fixed by the hearing officer and will be made available to any party, provided, however, that the production must be made under conditions intended to preserve the items to be inspected or copied.

(b) Failure to produce - harmless error. In the event that a statement required to be made available to a respondent pursuant to this section is not made available by the Office of Enforcement, no rehearing or redecision of a proceeding already heard or decided will be required unless the respondent establishes that the failure to make the statement available was not harmless error.

§ 1081.208 Subpoenas.

(a) Availability. In connection with any hearing ordered by the hearing officer or any deposition permitted under § 1081.209, a party may request the issuance of subpoenas requiring the attendance and testimony of witnesses at such depositions or at the designated time and place of the hearing, or the production of documentary or other tangible evidence returnable at any designated time or place.

(b) Procedure. Unless made on the record at a hearing, requests for issuance of a subpoena must be made in writing, and filed and served on each party pursuant to subpart A of this part. The request must contain a proposed subpoena and a brief statement showing the general relevance and reasonableness of the scope of testimony or documents sought.

(c) Signing may be delegated. A hearing officer may authorize issuance of a subpoena, and may delegate the manual signing of the subpoena to any other person.

(d) Standards for issuance of subpoenas requiring the attendance and testimony of witnesses at the hearing or the production of documentary or other tangible evidence. The hearing officer will promptly issue any subpoena requiring the attendance and testimony of witnesses at the designated time and place of the hearing or the production of documentary or other tangible evidence. Where it appears to the hearing officer that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, the hearing officer may, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show further the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the hearing officer determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, the hearing officer may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the hearing officer may inquire of the other parties whether they will stipulate to the facts sought to be proved.

(e) Standards for issuance of subpoenas requiring the deposition of a witness pursuant to § 1081.209. (1) The hearing officer will promptly issue any subpoena requiring the attendance and testimony of witnesses at a deposition only if the subpoena complies with § 1081.209 and if:

(i) The proposed deponent is a witness identified in the other party's scheduling conference disclosure under § 1081.203(b);

(ii) The proposed deponent was a witness of or participant in any event, transaction, occurrence, act, or omission that forms the basis for any claim asserted by the Office of Enforcement, any defense, or anything else required to be included in an answer pursuant to § 1081.201(b), by any respondent in the proceeding (this excludes a proposed deponent whose only knowledge of these matters arises from the Bureau's investigation, the Bureau's examination, or the proceeding);

(iii) The proposed deponent is designated as an "expert witness" under § 1081.210(b); provided, however, that the deposition of an expert who is required to submit a written report under § 1081.210(b) may only occur after such report is served;

(iv) The proposed deponent has custody of documents or electronic data relevant to the claims or defenses of any party (this excludes officers or personnel of the Bureau who have custody of documents or data that was produced by the Office of Enforcement to the respondent); or

(v) The proposed deponent is unavailable for the hearing as set forth in § 1081.209(c).

(2) Where it appears to the hearing officer that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, the hearing officer may, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show further the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the hearing officer determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, the hearing officer may refuse to issue the subpoena, or issue it only upon such conditions as fairness

requires. In making the foregoing determination, the hearing officer may inquire of the other parties whether they will stipulate to the facts sought to be proved.

(f) Service. Upon issuance by the hearing officer, the party making the request will serve the subpoena on the person named in the subpoena and on each party in accordance with § 1081.113(c). Subpoenas may be served in any State, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any State, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(g) Tender of fees required. When a subpoena compelling the attendance of a person at a hearing or a deposition is issued at the request of anyone other than an officer or agency of the United States, service is valid only if the subpoena is accompanied by a tender to the subpoenaed person of the fees for one day's attendance and mileage specified by § 1081.116.

(h) Place of compliance. A subpoena for a deposition may command a person to attend a deposition only as follows:

(1) Within 100 miles of where the person resides, is employed, or regularly transacts business in person;

(2) Within the State where the person resides, is employed, or regularly transacts business in person, if the person is a party or a party's officer;

(3) At such other location that the parties and proposed deponent stipulate; or

(4) At such other location that the hearing officer determines is appropriate.

(i) Production of documentary material. Production of documentary material in response to a subpoena must be made under a sworn certificate, in such form as the subpoena designates, by the person to whom the subpoena is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the subpoena and in the possession, custody, or control of the person to whom the subpoena is directed has been produced and made available to the custodian.

(j) Motion to quash or modify—(1) Procedure. Any person to whom a subpoena is directed, or who is an owner, creator, or the subject of the documents that are to be produced pursuant to a subpoena, or any party may, prior to the time specified therein for compliance, but in no event more than seven days after the date of service of such subpoena, move that the subpoena be quashed or modified. Such motion must be filed and served on all parties pursuant to subpart A of this part. Notwithstanding § 1081.205, the party on whose behalf the subpoena was issued or enforcement counsel may, within seven days of service of the motion, file a response to the motion. Reply briefs are not permitted unless requested by the hearing officer. Filing a motion to modify a subpoena does not stay the movant's obligation to comply with those portions of the subpoena that the person has not sought to modify.

(2) Standards governing motion to quash or modify. If compliance with the subpoena would be unreasonable, oppressive, or unduly burdensome, the hearing officer must quash or modify the subpoena, or may order return of the subpoena only upon specified conditions. These conditions may include but are not limited to a requirement that the party on whose behalf the subpoena was issued make reasonable compensation to the person to whom the subpoena was addressed for the cost of copying or transporting evidence to the place for return of the subpoena.

(k) Enforcing subpoenas. If a subpoenaed person fails to comply with any subpoena issued pursuant to this part or any order of the hearing officer which directs compliance with all or any portion of a subpoena, the Bureau's General Counsel may, on its own motion or at the request of the party on whose behalf the subpoena was issued, apply to an appropriate United States district court, in the name of the Bureau but on relation of such party, for an order requiring compliance with so much of the subpoena as the hearing officer has not quashed or modified, unless, in the judgment of the General Counsel, the enforcement of such subpoena would be inconsistent with law and the policies of the Consumer Financial Protection Act of 2010. Failure to request that the Bureau's General Counsel seek enforcement of a subpoena constitutes a waiver of any claim of prejudice predicated upon the unavailability of the testimony

or evidence sought.

(l) Relationship to scheduling of hearing. The parties must disclose at the scheduling conference required under § 1081.203(e) whether they intend to request the issuance of subpoenas under § 1081.209. A respondent's request for issuance of a subpoena constitutes a request that the hearing not be held until after a reasonable period, determined by the hearing officer, for the completion of discovery. The hearing officer will decide whether to grant such a request. If the request is granted, the hearing officer will set a deadline for the completion of discovery and schedule the specific date of the hearing, in consultation with the parties. This paragraph (l) does not apply to a subpoena for the attendance and testimony of a witness at the hearing or a subpoena to depose a witness unavailable for the hearing.

§ 1081.209 Depositions.

(a) Depositions by oral examination or by written questions. Depositions by oral examination or by written questions may be taken as set forth in this section and must be taken pursuant to subpoena issued under § 1081.208. Any deposition permitted under this section may be taken and submitted on written questions upon motion of any party, for good cause shown, or as stipulated by the parties. No other depositions will be permitted except as provided in paragraph (c) of this section.

(1) If the proceeding involves a single respondent, the respondent may depose no more than three persons, and the Office of Enforcement may depose no more than three persons.

(2) If the proceeding involves multiple respondents, the respondents collectively may depose no more than five persons, and the Office of Enforcement may depose no more than five persons. The depositions taken under this paragraph (a)(2) cannot exceed a total of five depositions for the Office of Enforcement, and five depositions for all respondents collectively.

(3) Any side may file a motion with the hearing officer seeking leave to take up to two additional depositions beyond those permitted pursuant to paragraphs (a)(1) and (2) of this section.

(i) Procedure. (A) A motion for additional depositions must be filed no later than 28 days prior to the hearing date. If the moving side proposes to take the additional deposition(s) by written questions, the motion must so state and include the proposed questions. Any party opposing the motion may submit an opposition within seven days after service of the motion. No reply will be permitted. The motion and any oppositions each must not exceed seven pages in length.

(B) Upon consideration of the motion and any opposing papers, the hearing officer will issue an order either granting or denying the motion. The hearing officer will consider the motion on an expedited basis.

(ii) Grounds and standards for motion. A motion under paragraph (a)(3) of this section will not be granted unless the additional depositions satisfy § 1081.208(d) and the moving side demonstrates a compelling need for the additional depositions by:

(A) Identifying all witnesses the moving side plans to depose under this section;

(B) Describing the role of all witnesses;

(C) Describing the matters concerning which all witnesses are expected to be questioned, and why the deposition of all witnesses is necessary for the moving side's arguments, claims, or defenses; and

(D) Showing that the additional deposition(s) requested will not be unreasonably cumulative or duplicative.

(b) Additional procedure for depositions by written questions. (1) Any motion or stipulation seeking a deposition of a witness by written questions must include the written questions the party seeking the deposition will ask the witness. Within seven days after service of the motion and written questions, any party may file objections to such written questions and any party may file cross-questions. When a deposition is taken by written questions, no persons other than the witness, counsel to the witness, the deposition officer, and, if the deposition officer does not act as reporter, a reporter, may be present at the examination of the witness. No party

may be present or represented unless otherwise permitted by order. The deposition officer will propound the questions and cross-questions to the witness in the order submitted.

(2) The order for deposition, filing of the deposition, form of the deposition, and use of the deposition in the record will be governed by paragraphs (d) through (l) of this section, except that no cross-examination will be made.

(c) Depositions when witness is unavailable. In addition to depositions permitted under paragraph (a) of this section, the hearing officer may grant a party's request for issuance of a subpoena if the requesting party shows that the prospective witness will likely give testimony material to the proceeding; that it is likely the prospective witness, who is then within the United States, will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment, other disability, or absence from the United States, unless it appears that the absence of the witness was procured by the party requesting the deposition; and that the taking of a deposition will serve the interests of justice.

(d) Service and contents of notice. Upon issuance of a subpoena for a deposition, the party taking the deposition must serve a notice on each party pursuant to § 1081.113. A notice of deposition must state that the deposition will be taken before a deposition officer authorized to administer oaths by the laws of the United States or of the place where the deposition is to be held. A notice of deposition also must state:

(1) The name and address of the witness whose deposition is to be taken;

(2) The time and place of the deposition; and

(3) The manner of recording and preserving the deposition.

(e) Method of recording—(1) Method stated in the notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the hearing officer orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition, at that party's expense. Each party will bear its own costs for obtaining copies of any

transcripts or audio or audiovisual recordings.

(2) Additional method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the hearing officer orders otherwise.

(f) By remote means. The parties and the deponent may stipulate—or the hearing officer may on motion order—that a deposition be taken by telephone or other electronic means. For the purpose of this section, the deposition takes place where the deponent answers the questions.

(g) Deposition officer's duties—(1) Before the deposition. The deposition officer must begin the deposition with an on-the-record statement that includes:

(i) The deposition officer's name and business address;

(ii) The date, time, and place of the deposition;

(iii) The deponent's name;

(iv) The deposition officer's administration of the oath or affirmation to the deponent; and

(v) The identity of all persons present.

(2) Conducting the deposition; avoiding distortion. If the deposition is recorded non-stenographically, the deposition officer must repeat the items in paragraphs (g)(1)(i) through (iii) of this section at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(3) After the deposition. At the end of a deposition, the deposition officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(h) Order and record of the examination—(1) Order of examination. The examination and cross-examination of a deponent will proceed as they would at the hearing. After putting the

deponent under oath or affirmation, the deposition officer must record the testimony by the method designated under paragraph (e) of this section. The testimony must be recorded by the deposition officer personally or by a person acting in the presence and under the direction of the deposition officer. The witness being deposed may have counsel present during the deposition.

(2) Form of objections stated during the deposition. An objection at the time of the examination—whether to evidence, to a party's conduct, to the deposition officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination may still proceed and the testimony may be taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the hearing officer, or to present a motion to the hearing officer for a limitation on the questioning in the deposition.

(i) Waiver of objections—(1) To the notice. An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) To the deposition officer's qualification. An objection based on disqualification of the deposition officer before whom a deposition is to be taken is waived if not made:

(i) Before the deposition begins; or

(ii) Promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) To the taking of the deposition—(i) Objection to competence, relevance, or materiality. An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(ii) Objection to an error or irregularity. An objection to an error or irregularity at an oral examination is waived if:

(A) It relates to the manner of taking the deposition, the form of a question or answer, the

oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(B) It is not timely made during the deposition.

(4) To completing and returning the deposition. An objection to how the deposition officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

(j) Duration; cross-examination; motion to terminate or limit—(1) Duration. Unless otherwise stipulated or ordered by the hearing officer, a deposition is limited to one day of seven hours, including cross-examination as provided in this paragraph (j)(1). In a deposition conducted by or for a respondent, the Office of Enforcement will be allowed a reasonable amount of time for cross-examination of the deponent. In a deposition conducted by the Office, the respondents collectively will be allowed a reasonable amount of time for cross-examination of the deponent. The hearing officer may allow additional time if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) Motion to terminate or limit—(i) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to present the motion to the hearing officer.

(ii) Order. Upon a motion under paragraph (j)(2)(i) of this section, the hearing officer may order that the deposition be terminated or may limit its scope. If terminated, the deposition may be resumed only by order of the hearing officer.

(k) Review by the witness; changes—(1) Review; statement of changes. On request by

the deponent or a party before the deposition is completed, and unless otherwise ordered by the hearing officer, the deponent must be allowed 14 days after being notified by the deposition officer that the transcript or recording is available, unless a longer time is agreed to by the parties or permitted by the hearing officer, in which:

(i) To review the transcript or recording; and

(ii) If there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes indicated in the deposition officer's certificate. The deposition officer must note in the certificate prescribed by paragraph (l)(1) of this section whether a review was requested and, if so, must attach any changes the deponent makes during the 14-day period.

(l) Certification and delivery; exhibits; copies of the transcript or recording—

(1) Certification and delivery. The deposition officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the hearing officer orders otherwise, the deposition officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney or party who arranged for the transcript or recording. The attorney or party must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and tangible things—(i) Originals and copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(A) Offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(B) Give all parties a fair opportunity to inspect and copy the originals after they are

marked—in which event the originals may be used as if attached to the deposition.

(ii) Order regarding the originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the transcript or recording. Unless otherwise stipulated or ordered by the hearing officer, the deposition officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the deposition officer must furnish a copy of the transcript or recording to any party or the deponent, as directed by the party or person paying such charges.

(m) Presentation of objections or disputes. Any party or deponent seeking relief with respect to disputes over the conduct of a deposition may file a motion with the hearing officer to obtain relief as permitted by this part.

§ 1081.210 Expert discovery.

(a) At a date set by the hearing officer at the scheduling conference, each party must serve the other with a report prepared by each of its expert witnesses. Each party must serve the other parties with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 28 days after the deadline for service of expert reports, unless another date is set by the hearing officer. A rebuttal report must be limited to rebuttal of matters set forth in the expert report for which it is offered in rebuttal. If material outside the scope of fair rebuttal is presented, a party may file a motion not later than seven days after the deadline for service of rebuttal reports, seeking appropriate relief with the hearing officer, including striking all or part of the report, leave to submit a surrebuttal report by the party's own experts, or leave to call a surrebuttal witness and to submit a surrebuttal report by that witness.

(b) No party may call an expert witness at the hearing unless the expert witness has been listed and has provided reports as required by this section, unless otherwise directed by the hearing officer at a scheduling conference. Each side will be limited to calling at the hearing five

expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.

(c) Each report must be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored or co-authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified or sought to testify as an expert at trial or hearing, or by deposition within the preceding four years. A rebuttal or surrebuttal report need not include any information already included in the initial report of the witness.

(d) A party may depose any person who has been identified as an expert whose opinions may be presented at trial upon subpoena issued under § 1081.208. Unless otherwise ordered by the hearing officer, a deposition of any expert witness will be conducted after the disclosure of a report prepared by the witness in accordance with paragraph (a) of this section, and at least seven days prior to the deadline for submission of rebuttal expert reports. A deposition of an expert witness must be completed no later than 14 days before the hearing unless otherwise ordered by the hearing officer. No expert deposition will exceed seven hours on the record, absent agreement of the parties or an order of the hearing officer for good cause shown. Expert depositions will be conducted pursuant to the procedures set forth in § 1081.209(d) through (l).

(e) A party may not discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for the hearing and who is not listed as a witness for the hearing. A party may not discover drafts of any report required by this section, regardless of the form in which the draft is recorded, or any communications between another party's attorney and any of that other party's experts, regardless of the form of the communications, except to the extent that the communications:

(1) Relate to compensation for the testifying expert's study or testimony;

(2) Identify facts or data that the other party's attorney provided and that the testifying expert considered in forming the opinions to be expressed; or

(3) Identify assumptions that the other party's attorney provided and that the testifying expert relied on in forming the opinions to be expressed.

(f) The hearing officer has the discretion to dispense with the requirement of expert discovery in appropriate cases.

§ 1081.211 Interlocutory review.

(a) Availability. The Director may, at any time, direct that any matter be submitted to the Director for review. Subject to paragraph (c) of this section, the hearing officer may, upon the hearing officer's motion or upon the motion of any party, certify any matter for interlocutory review by the Director. This section is the exclusive remedy for review of a hearing officer's ruling or order prior to the Director's consideration of the entire proceeding.

(b) Procedure. Any party's motion for certification of a ruling or order for interlocutory review must be filed with the hearing officer within seven days of service of the ruling or order, must specify the ruling or order or parts thereof for which interlocutory review is sought, must attach any other portions of the record on which the moving party relies, and must otherwise comply with § 1081.205. Notwithstanding § 1081.205, any response to such a motion must be filed within seven days of service of the motion. The hearing officer must issue a ruling on the motion within seven days of the deadline for filing a response.

(c) Certification process. Unless the Director directs otherwise, a ruling or order may not be submitted to the Director for interlocutory review unless the hearing officer, upon the hearing officer's motion or upon the motion of a party, certifies the ruling or order in writing. The hearing officer will not certify a ruling or order unless:

(1) The ruling or order would compel testimony of Bureau officers or employees, or those from another governmental agency, or the production of documentary evidence in the custody of the Bureau or another governmental agency;

(2) The ruling or order involves a motion for disqualification of the hearing officer pursuant to § 1081.105(c)(2);

(3) The ruling or order suspended or barred an individual from appearing before the Bureau pursuant to § 1081.107(c); or

(4) Upon motion by a party, the hearing officer is of the opinion that:

(i) The ruling or order involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) An immediate review of the ruling or order is likely to materially advance the completion of the proceeding or subsequent review will be an inadequate remedy.

(d) Interlocutory review. A party whose motion for certification has been denied by the hearing officer may petition the Director for interlocutory review.

(e) Director review. The Director will determine whether or not to review a ruling or order certified under this section or the subject of a petition for interlocutory review. Interlocutory review is generally disfavored. The Director may decline to review a ruling or order certified by a hearing officer pursuant to paragraph (c) of this section or the petition of a party who has been denied certification if the Director determines that interlocutory review is not warranted or appropriate under the circumstances, in which case the Director may summarily deny the petition. If the Director determines to grant the review, the Director will review the matter and issue a ruling and order in an expeditious fashion, consistent with the Bureau's other responsibilities.

(f) Proceedings not stayed. The filing of a motion requesting that the hearing officer certify any of the hearing officer's prior rulings or orders for interlocutory review or a petition for interlocutory review filed with the Director, and the grant of any such review, will not stay

proceedings before the hearing officer unless the hearing officer, or the Director, so orders. The Director will not consider a motion for a stay unless the motion was first been made to the hearing officer.

§ 1081.212 Dispositive motions.

(a) Dispositive motions. This section governs the filing of motions to dismiss and motions for summary disposition. The filing of any such motion does not obviate a party's obligation to file an answer or take any other action required by this part or by an order of the hearing officer, unless expressly so provided by the hearing officer.

(b) Motions to dismiss. A respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the notice of charges, it is entitled to dismissal as a matter of law.

(c) Motion for summary disposition. A party may make a motion for summary disposition asserting that the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in the moving party's favor as a matter of law.

(d) Filing of motions for summary disposition and responses. (1) After a respondent's answer has been filed and documents have been made available to the respondent for inspection and copying pursuant to § 1081.206, any party may move for summary disposition in its favor of all or any part of the proceeding.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in

pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the moving party contends support the moving party's position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as may be submitted in support of a motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(3) Any affidavit or declaration submitted in support of or in opposition to a motion for summary disposition must set forth such facts as would be admissible in evidence, must show affirmatively that the affiant is competent to testify to the matters stated therein, and must be signed under oath and penalty of perjury.

(e) Page limitations for dispositive motions. A motion to dismiss or for summary disposition, together with any brief in support of the motion (exclusive of any declarations, affidavits, or attachments) may not exceed 35 pages in length. Motions for extensions of this length limitation are disfavored.

(f) Opposition and reply response time and page limitation. Any party, within 21 days after service of a dispositive motion, or within such period as allowed by the hearing officer, may file a response to such motion. The length limitations set forth in paragraph (e) of this section also apply to such responses. Any reply brief filed in response to an opposition to a dispositive motion must be filed within seven days after service of the opposition. Reply briefs may not exceed ten pages.

(g) Relationship to scheduling of hearing. A respondent's filing of a dispositive motion constitutes a request that the hearing not be held until after the motion is resolved. The hearing officer will decide whether to grant such a request. If the request is granted, the hearing officer will schedule the specific date of the hearing, in consultation with the parties.

§ 1081.213 Rulings on dispositive motions.

(a) Ruling by Director or hearing officer. The Director will rule on a dispositive motion, refer the motion to the hearing officer, or rule on the motion in part and refer it in part.

(b) Timing of ruling. If the Director rules on the motion, the Director must do so within 42 days following the expiration of the time for filing all responses and replies, unless there is good cause to extend the deadline. If the Director refers the motion to the hearing officer, the Director may set a deadline for the hearing officer to rule.

(c) Oral argument. At the request of any party or on the Director or hearing officer's own motion, the Director or hearing officer (as applicable) may hear oral argument on a dispositive motion.

(d) Types of rulings—(1) Granting motion as to all claims and relief. If the Director or hearing officer (as applicable) determines that dismissal or summary disposition is warranted as to all claims and relief, then (as applicable) the Director will issue a final decision and order or the hearing officer will issue preliminary findings and conclusions.

(2) Granting motion as to some claims or relief. If the Director or hearing officer (as applicable) determines that dismissal or summary disposition is warranted as to some issues, but not all claims and relief, the Director or hearing officer will issue an order that directs further proceedings. Where the dispositive motion is a motion for summary disposition, the order will specify the facts that appear without substantial controversy. The facts so specified are be deemed established.

(3) Denial of motion. If the Director or hearing officer (as applicable) determines that dismissal or summary disposition is not warranted, the Director or hearing officer may make a ruling denying the motion. If it appears that a party, for good cause shown, cannot present by affidavit, prior to hearing, facts essential to justify opposition to a motion for summary disposition, the Director or hearing officer must deny or defer the motion, or do so in relevant part.

§ 1081.214 Prehearing conferences.

(a) Prehearing conferences. The hearing officer may, in addition to the scheduling conference, upon the hearing officer's motion or at the request of any party, direct counsel for the parties to meet with the hearing officer (in person or by electronic means) at a prehearing conference for further discussion of the issues outlined in § 1081.203, or for discussion of any additional matters that in the view of the hearing officer will aid in an orderly disposition of the proceeding, including but not limited to:

(1) Identification of potential witnesses and limitation on the number of witnesses;

(2) The exchange of any prehearing materials including witness lists, statements of issues, exhibits, and any other materials;

(3) Stipulations, admissions of fact, and the contents, authenticity, and admissibility into evidence of documents;

(4) Matters of which official notice may be taken; and

(5) Whether the parties intend to introduce prior sworn statements of witnesses as set forth in § 1081.303(h).

(b) Transcript. The hearing officer has discretion to require that a prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at that party's expense.

(c) Public access. Any prehearing conferences will be public unless the hearing officer determines, based on the standard set forth in § 1081.119(c), that the conference (or any part thereof) should be closed to the public.

§ 1081.215 Prehearing submissions.

(a) Generally. Within the time set by the hearing officer, but in no case later than 14 days before the start of the hearing, each party must serve on every other party:

(1) A prehearing statement, which must include an outline or narrative summary of the

party's case or defense, and the legal theories upon which the party will rely;

(2) A final list of witnesses to be called to testify at the hearing, including the name and address of each witness and a short summary of the expected testimony of each witness;

(3) Any prior sworn statements that a party intends to admit into evidence pursuant to § 1081.303(h);

(4) A list of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(5) Any stipulations of fact or liability.

(b) Expert witnesses. Each party who intends to call an expert witness must also serve, in addition to the information required by paragraph (a)(2) of this section, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given or sought to give expert testimony at trial or hearing or by deposition within the preceding four years, and a list of publications authored or co-authored by the expert within the preceding ten years, to the extent such information has not already been provided pursuant to § 1081.210.

(c) Effect of failure to comply. No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 1081.216 Amicus participation.

(a) Availability. An amicus brief may be filed only if:

(1) A motion for leave to file the brief has been granted;

(2) The brief is accompanied by written consent of all parties;

(3) The brief is filed at the request of the Director or the hearing officer, as appropriate; or

(4) The brief is presented by the United States or an officer or agency thereof, or by a State or a political subdivision thereof.

(b) Procedure. An amicus brief may be filed conditionally with the motion for leave. The motion for leave must identify the interest of the movant and state the reasons why a brief of an amicus curiae is desirable. Except as all parties otherwise consent, any amicus curiae must file its brief within the time allowed the party whose position the amicus will support, unless the Director or hearing officer, as appropriate, for good cause shown, grants leave for a later filing. If a later filing is allowed, the order granting leave to file must specify when an opposing party may reply to the brief.

(c) Motions. A motion for leave to file an amicus brief is subject to § 1081.205.

(d) Formal requirements as to amicus briefs. Amicus briefs must be filed pursuant to § 1081.111, comply with the requirements of § 1081.112, and are be subject to the length limitation in § 1081.212(e).

(e) Oral argument. An amicus curiae may move to present oral argument at any hearing before the hearing officer, but such motions will be granted only for extraordinary reasons.

Subpart C - Hearings

§ 1081.300 Public hearings.

All hearings in adjudication proceedings will be public unless a confidentiality order is entered by the hearing officer pursuant to § 1081.119 or unless otherwise ordered by the Director on the grounds that holding an open hearing would be contrary to the public interest.

§ 1081.301 Failure to appear.

Failure of a respondent to appear in person or by a duly authorized counsel at the hearing constitutes a waiver of respondent's right to a hearing and may be deemed an admission of the facts as alleged and consent to the relief sought in the notice of charges. Without further proceedings or notice to the respondent, the hearing officer will file preliminary findings and conclusions containing findings of fact and addressing the relief sought in the notice of charges.

§ 1081.302 Conduct of hearings.

All hearings will be conducted in a fair, impartial, expeditious, and orderly manner. Enforcement counsel will present its case-in-chief first, unless otherwise ordered by the hearing officer, or unless otherwise expressly specified by law or regulation. Enforcement counsel will be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the hearing officer will fix the order.

§ 1081.303 Evidence.

(a) Burden of proof. Enforcement counsel will have the burden of proof of the ultimate issue(s) of the Bureau's claims at the hearing.

(b) Admissibility. (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law. Irrelevant, immaterial, and unreliable evidence will be excluded.

(2) Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues; if the evidence would be misleading; or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(3) Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair. Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. If otherwise meeting the standards for admissibility described in this section, transcripts of depositions, investigational hearings, prior testimony in Bureau or other proceedings, and any other form of hearsay will be admissible and may not be excluded solely on the ground that they are or contain hearsay.

(4) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this part. Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this part solely on that basis.

(c) Official notice. Official notice may be taken of any material fact that is not subject to reasonable dispute in that it is either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. If official notice is requested or is taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, will be afforded an opportunity to disprove such noticed fact.

(d) Documents. (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (b) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by the Bureau, a prudential regulator, as that term is defined in section 1002(24) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481(24)), or by a State regulatory agency, is presumptively admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the hearing officer's discretion, be used with or without being admitted into evidence.

(4) As respondents are in the best position to determine the nature of documents generated by such respondents and which come from their own files, the burden of proof is on the respondent to introduce evidence to rebut a presumption that such documents are authentic and kept in the regular course of business.

(e) Objections. (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which will be included in the record. Rejected exhibits, adequately marked for identification, must be retained pursuant to § 1081.306(b) so as to be available for consideration by any reviewing authority.

(3) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(f) Stipulations. (1) The parties may, at any stage of the proceeding, stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(2) Unless the hearing officer directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(g) Presentation of evidence. (1) A witness at a hearing for the purpose of taking evidence must testify under oath or affirmation.

(2) A party is entitled to present its case or defense by sworn oral testimony and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the hearing officer, may be required for a full and true disclosure of the facts.

(3) An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him or her.

(4) The hearing officer will exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(i) Make the interrogation and presentation effective for the ascertainment of the truth;

(ii) Avoid needless consumption of time; and

(iii) Protect witnesses from harassment or undue embarrassment.

(5) The hearing officer may permit a witness to appear at a hearing via electronic means for good cause shown.

(h) Introducing prior sworn statements of witnesses into the record. At a hearing, any party wishing to introduce a prior, sworn statement of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefore. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement may be granted if:

(1) The witness is dead;

(2) The witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;

(3) The witness is unable to attend or testify because of age, sickness, infirmity, imprisonment, or other disability;

(4) The party offering the prior sworn statement has been unable to procure the attendance of the witness by subpoena; or

(5) In the discretion of the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard will be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration should also be given to the convenience of the parties in avoiding unnecessary expense.

§ 1081.304 Record of the hearing.

(a) Reporting and transcription. Hearings will be stenographically reported and transcribed under the supervision of the hearing officer, and the original transcript will be a part

of the record and the sole official transcript. The live oral testimony of each witness may be video recorded digitally, in which case the video recording and the written transcript of the testimony will be made part of the record. Copies of transcripts will be available from the reporter at prescribed rates.

(b) Corrections. Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner provided in this paragraph (b). Corrections ordered by the hearing officer or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the hearing officer, will be included in the record, and such stipulations, except to the extent they are capricious or without substance, must be approved by the hearing officer. Corrections will not be ordered by the hearing officer except upon notice and opportunity for the hearing of objections. Such corrections must be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages will be retained in the files of the Bureau.

(c) Closing of the hearing record. Upon completion of the hearing, the hearing officer will issue an order closing the hearing record after giving the parties seven days to determine if the record is complete or needs to be supplemented. The hearing officer retains the discretion to permit or order correction of the record as provided in paragraph (b) of this section.

§ 1081.305 Post-hearing filings.

(a) Proposed findings and conclusions and supporting briefs. (1) Using the same method of service for each party, the hearing officer will serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed promptly after that filing. Any party may file with the hearing officer proposed findings of fact, proposed conclusions of law, and a proposed order within 28 days following service of this notice by the hearing officer or within such longer period as may be ordered by the hearing officer.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document.

(b) Responsive briefs. Responsive briefs may be filed within 14 days after the date on which the parties' proposed findings, conclusions, and order are due. Responsive briefs must be strictly limited to responding to matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a responsive brief. Unless directed by the hearing officer, reply briefs are not permitted.

(c) Order of filing. The hearing officer may not order the filing by any party of any post-hearing brief or responsive brief in advance of the other party's filing of its post-hearing brief or responsive brief.

§ 1081.306 Record in proceedings before hearing officer; retention of documents; copies.

(a) Contents of the record. The record of the proceeding consists of:

(1) The notice of charges, the answer, and any amendments thereto;

(2) Each motion, submission, or other paper filed in the proceedings, and any amendments and exceptions to or regarding them;

(3) Each stipulation, transcript of testimony, and any document or other item admitted into evidence;

(4) Any transcript of a conference or hearing before the hearing officer;

(5) Any amicus briefs filed pursuant to § 1081.216;

(6) With respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal under § 1081.105(c), each affidavit or transcript of testimony taken and the decision made in connection with the request;

(7) All motions, briefs, and other papers filed on interlocutory appeal;

(8) All proposed findings and conclusions;

(9) Each written order issued by the hearing officer or Director; and

(10) Any other document or item accepted into the record by the hearing officer.

(b) Retention of documents not admitted. Any document offered into evidence but excluded will not be considered part of the record. The Office of Administrative Adjudication will retain any such document until the later of the date upon which an order by the Director ending the proceeding becomes final and not appealable, or upon the conclusion of any judicial review of the Director's order.

(c) Substitution of copies. A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this section.

Subpart D – Decision and Appeals

§ 1081.400 Preliminary findings and conclusions of the hearing officer.

(a) Time period for filing preliminary findings and conclusions. Subject to paragraph (b) of this section, the hearing officer must file preliminary findings and conclusions no later than 90 days after the deadline for filing post-hearing responsive briefs pursuant to § 1081.305(b) and in no event later than 360 days after filing of the notice of charges.

(b) Extension of deadlines. In the event the hearing officer presiding over the proceeding determines that it will not be possible to issue preliminary findings and conclusions within the time periods specified in paragraph (a) of this section, the hearing officer will submit a written request to the Director for an extension of the time period for filing the preliminary findings and conclusions. This request must be filed no later than 28 days prior to the expiration of the time for issuance of preliminary findings and conclusions. The request will be served on all parties in the proceeding, who may file with the Director briefs in support of or in opposition to the request. Any such briefs must be filed within seven days of service of the hearing officer's request and may not exceed five pages. If the Director determines that additional time is

necessary or appropriate in the public interest, the Director will issue an order extending the time period for filing preliminary findings and conclusions.

(c) Content. (1) Preliminary findings and conclusions must be based on a consideration of the whole record relevant to the issues decided, and be supported by reliable, probative, and substantial evidence. Preliminary findings and conclusions must include a statement of findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law, as well as the reasons or basis therefore, as to all the material issues of fact, law, or discretion presented on the record and the appropriate order, sanction, relief or denial thereof. Preliminary findings and conclusions must also state that a notice of appeal may be filed within 14 days after service of the preliminary findings and conclusions and include a statement that, unless a party timely files and perfects a notice of appeal of the preliminary findings and conclusions, the Director may adopt the preliminary findings and conclusions as the final decision and order of the Bureau without further opportunity for briefing or argument.

(2) Consistent with paragraph (a) of this section, when more than one claim for relief is presented in an adjudication proceeding, or when multiple parties are involved, the hearing officer may direct the entry of preliminary findings and conclusions as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of preliminary findings and conclusions.

(d) By whom made. Preliminary findings and conclusions must be made and filed by the hearing officer who presided over the hearings, except when that hearing officer has become unavailable to the Bureau.

(e) Reopening of proceeding by hearing officer; termination of jurisdiction. (1) At any time from the close of the hearing record pursuant to § 1081.304(c) until the filing of the hearing officer's preliminary findings and conclusions, a hearing officer may reopen the proceeding for the receipt of further evidence for good cause shown.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Director, the jurisdiction of the hearing officer is terminated upon the filing of the hearing officer's preliminary findings and conclusions with respect to those issues decided pursuant to paragraph (c) of this section.

(f) Filing, service, and publication. Upon filing by the hearing officer of preliminary findings and conclusions, the Office of Administrative Adjudication will promptly transmit the preliminary findings and conclusions to the Director and serve them upon the parties.

§ 1081.401 Transmission of documents to Director; record index; certification.

(a) Filing of index. At the same time the Office of Administrative Adjudication transmits preliminary findings and conclusions to the Director, the hearing officer will furnish to the Director a certified index of the entire record of the proceedings. The certified index must include, at a minimum, an entry for each paper, document or motion filed in the proceeding, the date of the filing, and the identity of the filer. The certified index must also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for each exhibit introduced and admitted into evidence and each exhibit introduced but not admitted into evidence.

(b) Retention of record items by the Office of Administrative Adjudication. After the close of the hearing, the Office of Administrative Adjudication will retain originals of any motions, exhibits or any other documents filed with, or accepted into evidence by, the hearing officer, or any other portions of the record that have not already been filed with the Office of Administrative Adjudication.

§ 1081.402 Notice of appeal; review by the Director.

(a) Notice of appeal—(1) Filing. Any party may file exceptions to the preliminary findings and conclusions of the hearing officer by filing a notice of appeal with the Office of Administrative Adjudication within 14 days after service of the preliminary findings and conclusions. The notice must specify the party or parties against whom the appeal is taken and

must designate the preliminary findings and conclusions or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter file a notice of appeal within seven days after service of the first notice, or within 14 days after service of the preliminary findings and conclusions, whichever period expires last.

(2) Perfecting a notice of appeal. Any party filing a notice of appeal must perfect its appeal by filing its opening appeal brief within 28 days of service of the preliminary findings and conclusions. Any party may respond to the opening appeal brief by filing an answering brief within 28 days of service of the opening brief. Any party may file a reply to an answering brief within seven days of service of the answering brief. These briefs must conform to the requirements of § 1081.403.

(b) Director review other than pursuant to an appeal. In the event no party perfects an appeal of the hearing officer's preliminary findings and conclusions, the Director will, within 42 days after the date of service of the preliminary findings and conclusions, either issue a final decision and order adopting the preliminary findings and conclusions, or order further briefing regarding any portion of the preliminary findings and conclusions. The Director's order for further briefing must set forth the scope of review and the issues that will be considered and will make provision for the filing of briefs in accordance with the timelines set forth in paragraph (a)(2) of this section (except that that opening briefs will be due within 28 days of service of the order of review) if deemed appropriate by the Director.

(c) Exhaustion of administrative remedies. Pursuant to 5 U.S.C. 704, a perfected appeal to the Director of preliminary findings and conclusions pursuant to paragraph (a) of this section is a prerequisite to the seeking of judicial review of a final decision and order, or portion of the final decision and order, adopting the preliminary findings and conclusions.

§ 1081.403 Briefs filed with the Director.

(a) Contents of briefs. Briefs must be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed should be stated succinctly. Exceptions

must be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions, and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded must be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs must be confined to matters in answering briefs of other parties.

(b) Length limitation. Except with leave of the Director, opening and answering briefs may not exceed 30 pages, and reply briefs may not exceed 15 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. Motions to file briefs in excess of these limitations are disfavored.

§ 1081.404 Oral argument before the Director.

(a) Availability. The Director will consider appeals, motions, and other matters properly before the Director on the basis of the papers filed by the parties without oral argument unless the Director determines that the presentation of facts and legal arguments in the briefs and record and decisional process would be significantly aided by oral argument, in which case the Director will issue an order setting the date on which argument will be held. A party seeking oral argument must so indicate on the first page of that party's opening or answering brief.

(b) Public arguments; transcription. All oral arguments will be public unless otherwise ordered by the Director. Oral arguments before the Director will be reported stenographically, unless otherwise ordered by the Director. Motions to correct the transcript of oral argument must be made according to the same procedure provided in § 1081.304(b).

§ 1081.405 Decision of the Director.

(a) Upon appeal from or upon further review of preliminary findings and conclusions, the Director will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all powers

which could have exercised if the Director had made the preliminary findings and conclusions. In proceedings before the Director, the record will consist of all items part of the record in accordance with § 1081.306 as follows: any notices of appeal or order directing review; all briefs, motions, submissions, and other papers filed on appeal or review; and the transcript of any oral argument held. Review by the Director of preliminary findings and conclusions may be limited to the issues specified in the notice(s) of appeal or the issues, if any, specified in the order directing further briefing. On notice to all parties, however, the Director may, at any time prior to issuance of the Director's decision, raise and determine any other matters that the Director deems material, with opportunity for oral or written argument thereon by the parties.

(b) Decisional employees may advise and assist the Director in the consideration and disposition of the case.

(c) In rendering the Director's decision, the Director will affirm, adopt, reverse, modify, set aside, or remand for further proceedings the preliminary findings and conclusions and will include in the decision a statement of the reasons or basis for the Director's actions and the findings of fact upon which the decision is predicated.

(d) At the expiration of the time permitted for the filing of reply briefs with the Director, the Office of Administrative Adjudication will notify the parties that the case has been submitted for final Bureau decision. The Director will issue and the Office of Administrative Adjudication will serve the Director's final decision and order within 90 days after such notice, unless within that time the Director orders that the adjudication proceeding or any aspect thereof be remanded to the hearing officer for further proceedings.

(e) The Office of Administrative Adjudication will serve copies of a final decision and order of the Director upon each party to the proceeding in accordance with § 1081.113(d)(2); upon other persons required by statute, if any; and, if directed by the Director or required by statute, upon any appropriate State or Federal supervisory authority. A final decision and order

will also be published on the Bureau's website or as otherwise deemed appropriate by the Bureau.

§ 1081.406 Reconsideration.

Within 14 days after service of the Director's decision and order, any party may file with the Director a petition for reconsideration, briefly and specifically setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the decision or order and upon which the petitioner had no opportunity to argue, in writing or orally, before the Director. No response to a petition for reconsideration may be filed unless requested by the Director, who will request such response before granting any petition for reconsideration. The filing of a petition for reconsideration does not operate to stay the effective date of the decision or order or to toll the running of any statutory period affecting such decision or order unless specifically so ordered by the Director.

§ 1081.407 Effective date; stays pending judicial review.

(a) Other than consent orders, which become effective at the time specified therein, an order to cease and desist or for other affirmative action under section 1053(b) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(b)) becomes effective at the expiration of 30 days after the date of service pursuant to § 1081.113(d)(2), unless the Director agrees to stay the effectiveness of the order pursuant to this section.

(b) Any party subject to a final decision and order, other than a consent order, may apply to the Director for a stay of all or part of that order pending judicial review.

(c) A motion for stay must state the reasons a stay is warranted and the facts relied upon, and must include supporting affidavits or other sworn statements, and a copy of the relevant portions of the record. The motion must address the likelihood of the movant's success on appeal, whether the movant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest.

(d) A motion for stay must be filed within 28 days of service of the order on the party. Any party opposing the motion may file a response within seven days after receipt of the motion. The movant may file a reply brief, limited to new matters raised by the response, within seven days after receipt of the response.

(e) The commencement of proceedings for judicial review of a final decision and order of the Director does not, unless specifically ordered by the Director or a reviewing court, operate as a stay of any order issued by the Director. The Director has discretion, on such terms as the Director finds just, to stay the effectiveness of all or any part of an order pending a final decision on a petition for judicial review of that order.

§ 1081.408 Issue exhaustion.

(a) Scope. This section applies to any argument to support a party's case or defense, including any argument that could be a basis for setting aside Bureau action under 5 U.S.C. 706 or any other source of law.

(b) Duties to raise arguments. A party must raise an argument before the hearing officer, or else it is not preserved for later consideration by the Director. A party must raise an argument before the Director, or else it is not preserved for later consideration by a court.

(c) Manner of raising arguments. An argument must be raised in a manner that complies with this part and that provides a fair opportunity to consider the argument.

(d) Discretion to consider unpreserved arguments. The Director has discretion to consider an unpreserved argument, including by considering it in the alternative. If the Director considers an unpreserved argument in the alternative, the argument remains unpreserved.

Subpart E - Temporary Cease-and-Desist Proceedings

§ 1081.500 Scope.

(a) This subpart prescribes the rules of practice and procedure applicable to the issuance of a temporary cease-and-desist order authorized by section 1053(c) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(c)).

(b) The issuance of a temporary cease-and-desist order does not stay or otherwise affect the proceedings instituted by the issuance of a notice of charges, which are governed by subparts A through D of this part.

§ 1081.501 Basis for issuance, form, and service.

(a) In general. The Director or the Director's designee may issue a temporary cease-and-desist order if the Director determines that one or more of the alleged violations specified in a notice of charges, or the continuation thereof, is likely to cause the respondent to be insolvent or otherwise prejudice the interests of consumers before the completion of the adjudication proceeding. A temporary cease-and-desist order may require the respondent to cease and desist from any violation or practice specified in the notice of charges and to take affirmative action to prevent or remedy such insolvency or other condition pending completion of the proceedings initiated by the issuance of a notice of charges.

(b) Incomplete or inaccurate records. When a notice of charges specifies, on the basis of particular facts and circumstances, that the books and records of a respondent are so incomplete or inaccurate that the Bureau is unable to determine the financial condition of the respondent or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of the respondent, then the Director or the Director's designee may issue a temporary order requiring:

(1) The cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(2) Affirmative action to restore such books or records to a complete and accurate state, until the completion of the adjudication proceeding.

(c) Content, scope, and form of order. Every temporary cease-and-desist order accompanying a notice of charges must describe:

(1) The basis for its issuance, including the alleged violations and the harm that is likely to result without the issuance of an order; and

(2) The act or acts the respondent is to take or refrain from taking.

(d) Effective and enforceable upon service. A temporary cease-and-desist order is effective and enforceable upon service.

(e) Service. Service of a temporary cease-and-desist order will be made pursuant to § 1081.113(d).

§ 1081.502 Judicial review, duration.

(a) Availability of judicial review. Judicial review of a temporary cease-and-desist order is available solely as provided in section 1053(c)(2) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(c)(2)). Any respondent seeking judicial review of a temporary cease-and-desist order issued under this subpart must, not later than ten days after service of the temporary cease-and-desist order, apply to the United States district court for the judicial district in which the residence or principal office or place of business of the respondent is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order.

(b) Duration. Unless set aside, limited, or suspended by the Director or the Director's designee, or by a court in proceedings authorized under section 1053(c)(2) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(c)(2)), a temporary cease-and-desist order will remain effective and enforceable until:

(1) The effective date of a final order issued upon the conclusion of the adjudication proceeding.

(2) With respect to a temporary cease-and-desist order issued pursuant to § 1081.501(b) only, the Bureau determines by examination or otherwise that the books and records are accurate and reflect the financial condition of the respondent, and the Director or the Director's designee issues an order terminating, limiting, or suspending the temporary cease-and-desist order.

Rohit Chopra,

Director, Bureau of Consumer Financial Protection.

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